

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AMO DEVELOPMENT, LLC,)
AMO MANUFACTURING USA,)
LLC, and AMO SALES AND)
SERVICE, INC.,)

Plaintiffs,)

v.)

ALCON VISION, LLC, ALCON)
LABORATORIES, INC., and)
ALCON RESEARCH, LLC,)

Defendants.)

C.A. No. 20-842-CFC

Wednesday, January 18, 2023
3:00 p.m.
Pretrial Conference

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE COLM F. CONNOLLY
United States District Court Judge

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL
BY: JACK B. BLUMENFELD, ESQ.
BY: ANTHONY RAUCCI, ESQ.

-and-

1 APPEARANCES CONTINUED:

2
3 LATHAM & WATKINS

4 BY: MICHAEL A. MORIN, ESQ.

5 BY: RACHEL RENEE BLITZER, ESQ.

6 BY: SARANG V. DAMLE, ESQ.

7 BY: TONY SAMMI, ESQ.

8 BY: ROGER CHIN, ESQ.

9 BY: CAROLYN HOMER, ESQ.

10 BY: RACHEL COHEN, ESQ.

11 Counsel for the Plaintiff

12
13 SHAW KELLER

14 BY: KAREN KELLER, ESQ.

15 -and-

16 KIRKLAND & ELLIS

17 BY: JEANNE M. HEFFERNAN, ESQ.

18 BY: GREGG F. LOCASCIO, ESQ.

19 BY: NOAH S. FRANK, ESQ.

20 BY: JOSHUA SIMMONS, ESQ.

21 BY: ELIZABETH HEDGES, ESQ.

22 BY: JAMES LOMELO, ESQ.

23 Counsel for the Defendants

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P R O C E E D I N G S

(Proceedings commenced in the courtroom beginning at 3:00 p.m.)

THE COURT: All right. Mr. Blumenfeld.

MR. BLUMENFELD: Thank you, Your Honor.

Jack Bloomfeld for Morris Nichols for the plaintiffs, and with me at counsel table from Latham & Watkins, Mike Morin, Tony Sammi, Roger Chin, Sy Damle; behind them, Carolyn Homer, Rachael Blitzler, Rachel Cohen; and in the first row, Denise DeFranco, who is in-house at Johnson & Johnson; and behind her, Anthony Raucci, who is at Morris Nichols.

Thank you, Your Honor.

THE COURT: Ms. Keller, haven't seen in you a while.

MS. KELLER: Yes. Good afternoon, Your Honor. Mr. Shaw sends his regards. He's on vacation, so I'm here today.

With me today on behalf of Alcon from Kirkland & Ellis is Gregg LoCascio, Jeanne Heffernan, Noah Frank, and Joshua Simmons, and also Elizabeth Hedges and James Lomeo; in the back from Alcon, we have Jeff Prokop and Brannon Latimer.

1 **THE COURT:** All right, great. Thank you.

2 All right. We have a lot to accomplish, and I
3 don't even think we're going to come close to
4 accomplishing it in two hours. So I'm thinking of
5 bringing you all back February 6, Monday afternoon. Is
6 that workable?

7 I mean, we're going to get through everything
8 we can today, but...

9 **MR. LOCASCIO:** It is on our camp.

10 **MR. MORIN:** Of course, Your Honor.

11 **THE COURT:** Okay. That works. Great. So
12 let's do that.

13 You also -- the case manager reminds me that we
14 need to address, before we leave today, jury selection
15 dates, whether it's going to be a Friday or Monday.

16 Let me go ahead and say, you need to all submit
17 a glossary to the court reporter a week before the trial
18 date. And please remind me just to formally adopt the
19 pretrial order as modified by our rulings today.

20 So a very interesting case in so many regards.
21 And, you know, I do appreciate the lawyering in this case.
22 Got to see a lot of it.

23 I'm trying to figure out, like, how best to
24 resolve, kind of, the many motions out there and what are
25 some, maybe, threshold issues that we ought to grapple

1 with. One, for instance, that occurs to me is, I think,
2 maybe, whether or not JJSV is a beneficial owner of the
3 copyrighted -- of the asserted copyrights might dictate
4 the outcome of a number of issues pending before me. And
5 maybe that's a place to start.

6 What do you all think?

7 Are there any other issues like that, for
8 instance, that you say, oh, that would be a real -- I hate
9 the word "impactful," but I'll just say -- or
10 consequential decision?

11 **MR. MORIN:** Sure. Your Honor, I think the JJSV
12 one makes sense. My partner, Roger Chin, will be
13 addressing that issue. We're going to have a cast of
14 characters today, if that's okay with Your Honor.

15 **THE COURT:** Yeah, that's fine.

16 **MR. MORIN:** One other issue that may cut across
17 multiple motions is, Your Honor granted statute of
18 limitations. And as you probably saw in some of the
19 papers -- and I would be happy to explain more -- we
20 think, unfortunately for us, that moots the issue of the
21 alleged delay in bringing the lawsuit -- and I can explain
22 that more -- which cuts across multiple motions as well.

23 But I'd be happy to explain that later, as
24 well, whenever you'd like.

25 **THE COURT:** Well, you can. I mean, I will tell

1 you, you know, I'm going to be very surprised if you
2 persuade me of that. You know, I think what comes out of
3 *Petrella* are three rules, for sure. And they're stated
4 right at the outset of Justice Ginsburg's opinion.

5 And one of the rules, the third rule, is that
6 delay can also always -- and I think the word "always" is
7 used by Justice Ginsburg -- be relevant to assessing the
8 profits of the infringer. And I don't know how you're
9 going to escape that.

10 The second rule right before it is that in
11 extraordinary circumstances, it may be the case that
12 laches could be considered. And, but anyway, I just think
13 that third rule, I don't know how you're ever going to
14 overcome that.

15 Now, how that plays out, whether it's in front
16 of a jury, whether it's not, I think those are potentially
17 issues, so.

18 But do you have any other, though, suggestions?
19 I mean, you know, we can tackle that issue too. I mean, I
20 will be -- like the JJSV is one that, right away, I think
21 it makes sense to tackle.

22 **MR. LOCASCIO:** I agree on the JJSV issue.
23 Mr. Frank is going to handle that on our side.

24 I think you raise a point there, we would
25 raise, obviously, in response on the delay issue in

1 *Petrella*. There's other reasons, we think, it's also
2 relevant.

3 There's a piece, though, that you touched on
4 that I think is a threshold issue too, and that's the
5 place for disgorgement and who decides it. And under the
6 law, we think it's an issue for Your Honor to decide;
7 they've raised should it be an advisory verdict. At which
8 point, you'd still decide the findings at the end would go
9 to the jury.

10 I think that question impacts jury
11 instructions, how we plan to try the case and a lot of
12 things. So put that on the list.

13 **THE COURT:** So I agree with you, that's a big
14 one. I'm wondering though, if I decide that JJSV is
15 not -- doesn't have standing because it's not a beneficial
16 owner, I don't know, does that -- how that affects
17 disgorgement. It seems to me it would, maybe -- somebody
18 is shaking their head it won't. Okay.

19 So I thought it might, at least the scope of
20 what you want to present, would be affected.

21 **MR. LOCASCIO:** I think it would have an impact,
22 but at some point we can -- I think we've got a slide to
23 sort of layout the various damages, sort of, three-headed
24 beast over here on the other side, because there's -- the
25 JJSV statute -- or motion for summary judgment two

1 question goes to actual damages of, has someone been
2 injured and can they make a claim for actual damages,
3 because you have to be a party with an ownership interest
4 to do so.

5 Mr. Frank can speak way more intelligently to
6 this issue than I can.

7 But the disgorgement side of the house, because
8 there's, sort of, some versions where they have a
9 combination, may be a royal plus disgorgement, maybe just
10 disgorgement, that piece, we think, is an issue for
11 Your Honor.

12 And so there's some interplay here because it's
13 a little bit like a Venn diagram of profits plus
14 disgorgement under one of their theories; straight
15 disgorgement under another, royalty plus disgorgement.

16 **THE COURT:** Okay. Well, actually on that,
17 yeah, one thing I want to do early on, but I think maybe
18 we'll do it after we tackle JJSV is, I would like you to
19 just tell me in very simple terms: What are your damages,
20 you know?

21 It seems like it's -- I was thinking kind of a
22 three-headed monster of actual damages, lost profits, or,
23 you know, unjust enrichment/accounting/disgorgement. And
24 then -- do you have a reasonable royalty too?

25 **MR. MORIN:** We do, Your Honor.

1 **THE COURT:** Okay. So it is those three things?

2 **MR. MORIN:** Those are the three buckets,
3 Your Honor.

4 **THE COURT:** Okay. All right.

5 **MR. MORIN:** The latter two, lost profits and
6 royalty, are both under actual damages, and then
7 disgorgement is the other bucket.

8 And I thought, for the sake of making sure
9 we -- you know, we have agreement, the JJSV decision is a
10 consequential decision, but we agree that it's not a
11 disgorgement issue. It's an actual damages issue because
12 it goes to who can collect their harms.

13 And the disgorgement is, of course, on the
14 Alcon side of the house; do they have to give up profits
15 that they've made.

16 So they're -- I think we're in agreement that
17 JJSV would affect actual damages, but not disgorgement
18 when it comes to the calculation of the result.

19 **THE COURT:** Well, let's see, okay. I mean, I'm
20 glad, maybe, you're in agreement. I would have thought
21 there's something in the case law that does -- there's
22 language in the some of the cases that suggest that the
23 defendants' profits, at times, are used as a proxy for
24 actual damages, and in which case I thought maybe it would
25 come up.

1 But, frankly, I think the case law is all over
2 the place, and let's put this aside, but...

3 **MR. MORIN:** Well, may I offer one other thing?
4 And then I'll sit down and let Mr. Chin pick up the JJSV
5 issue -- or maybe it's their motion, it depends on
6 which -- whether we're dealing with the motion to realign
7 or whether we're dealing with our motion.

8 But let me say one other thing only as a
9 preview, but to plant something in your -- in Your Honor's
10 mind, if you don't mind.

11 **THE COURT:** Sure.

12 **MR. MORIN:** So there is a -- there are cases
13 going -- I will admit, there are cases going either way on
14 whether the issue of disgorgement is for the judge or the
15 jury. Judge Payne in the *Huffman* case takes into account
16 the trial and says it goes to the jury. The *Fair Isaac*
17 case is their lead case -- it's a Minnesota case. It says
18 it goes to the judge.

19 So there are cases that go either way. I'll
20 agree with my friend on that aspect of things.

21 We believe firmly it's a jury issue. But let
22 me just plant one bug in your ear, Your Honor, is, even
23 the *Fair Isaac's* case -- and I can pass it up -- that's
24 their lead case, if you're familiar with that case,
25 Your Honor.

1 **THE COURT:** It's not ringing a bell. Who
2 decided it?

3 **MR. MORIN:** It's a Minnesota magistrate judge
4 who decided that --

5 **THE COURT:** I'll listen to you. I don't put a
6 lot of stake in non-Appellate Court opinions. But go
7 ahead anyway.

8 You think -- is that your lead case?

9 **MR. LOCASCIO:** Our lead case is *Petrella*.

10 **THE COURT:** Yeah, I was going to say, so...

11 **MR. LOCASCIO:** And then, if you look at --
12 there's a Federal Circuit case, *TAOS*.

13 And then the District of Minnesota and the
14 District of Kansas that are -- sort of, come later in
15 time, and all treated as it's equitable, to start with.
16 No dispute it's disgorgement. It's not a proxy. And it's
17 not a proxy in this case.

18 And in the wake of that -- it's an issue for
19 the Court -- and this -- and where I think Mr. Morin is
20 going is, Courts will sometimes say, I'm still going to
21 leave it as an advisory verdict.

22 And indeed, the *Fair Isaac* case said, listen,
23 because this is kind of an uncharted issue. I think
24 *Petrella* decides it, but there's no case specifically
25 saying this point. The judge in *Fair Isaac* said, I think

1 it's not a jury issue but advisory verdict.

2 **THE COURT:** Okay.

3 **MR. MORIN:** And the point I was getting to --
4 we're starting to preview the arguments, and my friend is
5 very good at it --

6 **THE COURT:** Well, you started it, so you can't
7 blame him. You started it.

8 **MR. MORIN:** I am not complaining, Your Honor.
9 He is doing the right thing, adjoining argument with me,
10 Your Honor.

11 **THE COURT:** Yeah.

12 **MR. MORIN:** But, Your Honor, the point I was
13 getting to is, like I said, even the cases -- the few
14 cases that have gone the other way, the *Fair Isaac's* case,
15 he says, I don't know what the Eighth Circuit is going to
16 do, because it's so muddled, so I'm going to set it for an
17 advisory verdict.

18 There's another case that we cite, Your Honor,
19 the Sysco case out of the Judge Freeman, out of the
20 Northern District of California.

21 And I know that we're not putting stock in what
22 the decision is, but he says, I don't have to --

23 **THE COURT:** I think it's a "she." I think
24 Judge Freeman is a --

25 **MR. MORIN:** She. She, I'm sorry. She, she. I

1 was thinking there was another decision from Judge Alsup
2 in the Northern District of California that --

3 **THE COURT:** That's a "he."

4 **MR. MORIN:** -- does the same thing.

5 She says, Judge Freeman says, "I don't have to
6 decide this now. I'll send it to the jury, and it will
7 either be advisory or conclusive."

8 So I guess what I'm saying to Your Honor is, if
9 it's going advisory anyway -- which no case has said,
10 don't at least go advisory -- you can send it to the jury,
11 and we can sort it out later on, and decide later on, even
12 in post-trial briefs, whether it has the effect of an
13 advisory jury or whether it's the binding decision.

14 In other words, you don't actually have to
15 decide the issue now. I'm prepared to try to persuade you
16 that we're right. But you don't actually have to decide
17 the issue now.

18 If you're at the very least going to do an
19 advisory jury, send it to the jury, and we can sort it out
20 afterwards, which is what Sysco did.

21 **THE COURT:** Okay. We'll talk about it.

22 **MR. MORIN:** Yeah.

23 **THE COURT:** But have your people look.

24 There's, I think, Federal Circuit case out there that
25 talks about how it's -- it can be error to put in front of

1 a jury a massive number and then have a decision made.

2 But anyway, we'll leave that for oral argument.

3 No more on that.

4 **MR. MORIN:** Yeah, okay.

5 **THE COURT:** Okay. So let's just do this. All
6 I want to hear -- and, really, in a way, the burden is on
7 you. And by this I mean, you've got to establish
8 standing.

9 So why don't you go first and tell me why JJSV
10 either should be a party, and if not a party, whether its
11 lost profits are fairly incorporated in the damages award.

12 **MR. CHIN:** Sure. Thank you, Your Honor.

13 Roger Chin for plaintiffs.

14 Procedural question, there's both the motion to
15 amend, which has the procedural aspects, as well as the
16 substantive. I'd be happy to jump into either.

17 **THE COURT:** All I want to know is: Why is JJSV
18 properly considered either as a party or -- and I think
19 it's effectively the same question -- why, if it's not a
20 party, should its lost profits, Catalys sales, in terms of
21 Catalys sales or IOL sales, why should they be considered
22 as part of the damages?

23 Do you agree that both -- that for them to
24 either be a party or for their lost profits to be included
25 in a damages award, they must be a beneficial owner of the

1 asserted copyrights? Do you agree with that?

2 **MR. CHIN:** I think that there are two
3 independent pathways for damages to be recovered. And
4 this is lost profits damages for that portion of lost
5 profits that goes to JJSV. There are two pathways.
6 Number 1 --

7 **THE COURT:** So can you answer the question?

8 **MR. CHIN:** It does not have to be a beneficial
9 owner.

10 **THE COURT:** Okay. So it does not have to be.
11 Okay.

12 **MR. CHIN:** That's one of two alternatives.

13 **THE COURT:** Okay. All right.

14 **MR. CHIN:** So the two alternatives are,
15 Number 1, JJSV has assigned its legal title to AMO
16 Development. And with that assignment, it also assigned
17 rights for its claims, that it is assigned its claims for
18 damages to AMO Development.

19 So AMO Development, under black-letter law,
20 stands in the shoes --

21 **THE COURT:** I don't know how you possibly -- I
22 don't even know how you make that argument with a straight
23 face.

24 The agreement says they gave up all legal
25 rights as of April 2, 2007. You don't get to give up all

1 your legal rights and then retain claims that you then
2 possess after April 2 in 2007. They've given up
3 everything as of April 2, 2007.

4 So I don't understand that at all. So do your
5 best to explain it. It's not in your brief, incidentally.
6 It's in no briefing, as far as I can tell.

7 **MR. CHIN:** Yes. So I think it's -- it would be
8 helpful to turn to the transfer agreement itself, which
9 both parties had identified.

10 That's Exhibit 27.

11 **THE COURT:** Exhibit 27 to what?

12 **MR. CHIN:** Good question. Docket 427, I
13 believe that's Exhibit 27 to...

14 **THE COURT:** All right. I got it. I'm looking
15 at it.

16 **MR. CHIN:** So it's pretty short, and I think
17 the first page answers the question.

18 The transfer agreement was dated August 21,
19 2020, and effective April of 2007. The transfer provision
20 in -- and it's clear that as of August 21, 2020, we
21 believe that JJSV had a claim for damages that it was able
22 to transfer to another party that stands in its shoes.

23 Now, let's take a look at the agreement itself.

24 Paragraph 2, towards the bottom of the page,
25 the transfer says that JJSV transfers the rights to AMO

1 Development from and after the effective date of all
2 rights, all passed claims for damages, et cetera. So --

3 **THE COURT:** Time out.

4 I'm going to stop you right away because I
5 looked at the transcript. I had to reflect on what you
6 said.

7 **MR. CHIN:** Sure.

8 **THE COURT:** You said, the transfer provision,
9 it's clear, that as of August 21, 2020, we believe that
10 JJSV had a claim for damages.

11 Okay. Stop you right there.

12 And if the effective date of the transfer
13 agreement was August 21, 2020, different world; but the
14 agreement provides that the effective date of the transfer
15 is April 2, 2007.

16 So it doesn't matter what claims have arisen
17 after April 2, 2007. This transfer occurred effective
18 April 2, 2007.

19 Now, mind you, my sense is, from talking with
20 my clerks that there's actually cases that say you can't
21 retroactively assign a copyright -- but neither of you
22 have raised that argument, and it's waived if you tried to
23 raise it now, and I don't know how it would necessarily
24 help you -- but you picked the effective date.

25 So it doesn't matter, as far as I can tell,

1 that as of August 21, 2020, you had some legal claim,
2 because this agreement says it's effective April 2, 2007.

3 **MR. CHIN:** What I think is important is the
4 intent on the parties. Obviously, it's the intent of JJSV
5 and AMO Development, as captured in Exhibit 27, the
6 transfer agreement.

7 And the intent of the agreement, I think, is
8 quite clearly stated in Paragraph 2 when it states that it
9 transfers the rights from and after the effective date.

10 Now, we are into a rather odd metaphysical
11 question of, can you -- you know, you say it's
12 retroactive, but it was done in August of 2020.

13 **THE COURT:** I know, but you decided to phrase
14 it this way. And by the way, you did it after litigation
15 started.

16 So you think you're allowed to play fast and
17 loose and say "from and after the effective date"? I
18 mean...

19 **MR. CHIN:** The transfer is a decision by the
20 parties. Obviously, the intent of the parties controls.

21 **THE COURT:** No. Well, okay. Well, the
22 language controls. I mean, it's -- this is under what
23 law? Laws of Delaware.

24 So we don't go beyond the four corners of the
25 agreement under Delaware contract law. If it's clear on

1 its face. It says effect date is April 2, 2007.

2 **MR. CHIN:** As I said, it's effective then. But
3 it was effective to transfer rights from and after the
4 effective date.

5 **THE COURT:** So, okay.

6 **MR. CHIN:** Now, just to be clear in terms of
7 the timeline, JJSV, as stated in our papers, acquired a
8 legal ownership right through authorship of its employee,
9 Mr. Duff.

10 And for purposes of these motions, I don't
11 think that's disputed. May be a factual dispute, but it
12 hasn't been contested --

13 **THE COURT:** And when did that occur? When did
14 his actions occur?

15 **MR. CHIN:** That was, I believe, between 2000 --
16 after 2007.

17 **THE COURT:** Right. But you've already given up
18 your right as of April 2, 2007.

19 **MR. CHIN:** Well, to the extent that one reads
20 this as giving up rights prior to April 2, 2007, any
21 subsequently acquired rights, if one were to read it that
22 way, would then exist after the fact, and that would still
23 be with JJSV. That is --

24 **THE COURT:** Under your reading of this
25 contract -- I mean, think about it now, just like a

1 hypothetical, it's like I could -- I could assign a patent
2 to somebody and I could say, "I'm giving you all the
3 rights effective January 1, 10 years ago. Oh, but by the
4 way, I'm keeping all my rights after and before that
5 date."

6 I mean, at that point, now we're both -- we
7 both just have the rights to everything. I mean, it seems
8 absurd.

9 **MR. CHIN:** So what was transferred -- what
10 would be transferred as of April 2007? The only thing
11 that would be transferred as of April 2007 are rights that
12 JJSV had as of April 2007.

13 If JJSV acquired additional rights after
14 April 2007, that would have to be a separate transfer. If
15 they didn't exist, they wouldn't have been transferred as
16 of April 2007. They would have been transferred as of
17 August 2020, when the parties agreed from and after the
18 effective date to transfer copyrights, as well as claims
19 for damages.

20 **THE COURT:** I mean, JJSV irrevocably sells,
21 transfers, conveys, assigns and delivers to AMO
22 Development from -- and I agree it says "and after the
23 effective date" and in perpetuity.

24 It's already done it. As of April 2, 2007,
25 it's transferred everything. There's nothing else to

1 reclaim. It transferred everything.

2 It says, "Any and all of its rights, titles and
3 interests to and under the copyright."

4 It's gone. You know, you picked April 2, 2007.
5 I don't know why you picked it. You gave it all up.

6 **MR. CHIN:** Well, to the extent that -- so let's
7 talk about Mr. Duff's work in the 2007 to 2010 --

8 **THE COURT:** You've already given up. Anything
9 that happens after April 2, 2007, you've given up under
10 the terms of your contract.

11 **MR. CHIN:** And if it has been given up and
12 transferred to AMO Development, then AMO Development
13 stands in the shoes of the rights that JJSV would have to
14 make those claims.

15 **THE COURT:** No. AMO Development took whatever
16 existed as of April 2, 2007. You're out of the picture,
17 "you" JJSV. And now AMO Development is the party that, if
18 a claim arises, it's the legal copyright titleholder.

19 By the way, that's what you allege in the
20 complaint, right? You say it has the rights.

21 **MR. CHIN:** That is correct. We believe that
22 AMO Development today, and as of August 2020, has the
23 legal ownership rights.

24 (Cross-talking.)

25 **THE COURT:** All right. I'm not persuaded by

1 anything you say, so let's just do this.

2 **MR. CHIN:** Okay.

3 **THE COURT:** And I think it's funny you spent
4 barely any time in your briefing defending or taking on
5 this position that you've articulated here.

6 So what you do argue in your briefing is you're
7 a beneficial owner.

8 **MR. CHIN:** That's right.

9 **THE COURT:** All right. So now, why don't you
10 at least address that argument.

11 **MR. CHIN:** Okay. So the legislative history of
12 the Copyright Act, of course, gives the one example, which
13 both sides have identified from case law, of the
14 beneficial owner being a former -- being an author and
15 former legal titleholder who transfers rights in exchange
16 for royalty.

17 The legislative history and the case law that
18 cites that indicates that it includes, but is not
19 necessarily limited to that situation.

20 So what do we have here? We have an entity
21 that was an author via Mr. Duff, and therefore a legal
22 title owner by virtue of being an author, that has
23 transferred rights to another entity, AMO Development.

24 The former legal titleholder also shares
25 economic interests because it is involved in development,

1 marketing and sales of products covered by the copyright.

2 So we have a situation where -- and I should
3 add one more fact, and that is that --

4 **THE COURT:** Why is it relevant that you had
5 Duff do work? Why is that relevant?

6 **MR. CHIN:** Duff was the contributor to the
7 copyrighted software, so -- and he was an employee of
8 JJSV. So that makes JJSV having owner -- legal ownership
9 interest at the time that he does --

10 **THE COURT:** That's where the transfer agreement
11 kills you. You gave that up April 2, 2007. So is there
12 any other reason it would be relevant?

13 **MR. CHIN:** Well, he's an author as well. And,
14 of course, under the Copyright Act, authors have -- have a
15 special status. That is, in fact, why the legislative
16 history identifies authors who transferred economic
17 interest -- transfer the title, and who retain an economic
18 interest to have beneficial ownership.

19 So we are in a situation, putting aside the
20 timing of the transfer. We have an entity that is an
21 author, at least a coauthor, of the copyrighted software
22 via Mr. Duff. JJSV is the author.

23 It is transferred -- either as of April of 2007
24 or August of 2020, it's transferred the copyright to the
25 legal title owner. And the legal title owner owes a

1 fiduciary duty to JJSV. JJSV remains involved. And, of
2 course, JJSV is an author via Mr. Duff.

3 Now, those circumstances line up quite closely
4 with both the *SBK* case and the *Peter Pan* case, identifying
5 who constitutes a beneficial owner.

6 **THE COURT:** How do they line up?

7 *SBK*, you're talking has -- it talks about
8 royalty fee and a license. Do you have that here?

9 **MR. CHIN:** Yes. So in the *SBK* --

10 **THE COURT:** You do? JJSV has --

11 **MR. CHIN:** I'm sorry. No, I --

12 **THE COURT:** JJSV has a loyalty?

13 **MR. CHIN:** Oh, I thought you said did I have
14 the *SBK* case in mind. I'm sorry.

15 (Court reporter clarification.)

16 **MR. CHIN:** So, yes.

17 **THE COURT:** You said *SBK* lines up nicely here.
18 And so my question is: Is there a royalty or license in
19 the *SBK* case?

20 **MR. CHIN:** It is a royalty case.

21 **THE COURT:** Right. So do we have that here?
22 Do we have a royalty or a license?

23 **MR. CHIN:** As I mentioned, the legislative
24 history -- which *SBK* is following -- identifies that one
25 exemplary case. But *SBK* explains that the beneficial

1 owner is one that retains an economic interest from
2 proceeds derived from the exploitation of the copyright.

3 So while the particular example in *SBK* is a
4 retained royalty, it describes the retained royalty and
5 the significance of it as a retained economic interest in
6 the proceeds derived from the exploitation of the
7 copyright.

8 And that's what -- that's how it lines up with
9 the current situation, where JJSV, likewise, has an
10 economic interest in the proceeds derived from
11 exploitation of the copyright through its joint -- through
12 its involvement in development, marketing and so forth.

13 **THE COURT:** Okay.

14 **MR. CHIN:** Now, the other case, *Peter Pan*, it's
15 an old case, but it identifies what is called an equitable
16 interest, which the 1976 Act had codified into the words
17 of "beneficial owner."

18 So *Peter Pan* is essentially describing the
19 equitable basis for the codification of beneficial owner.

20 And in *Peter Pan*, the situation was a
21 subsidiary and a parent. The subsidiary was a legal title
22 owner of the copyright. And the parent had an equitable
23 interest because it was the parent who was owed a
24 fiduciary duty by the subsidiary, and it was, likewise,
25 involved in development, marketing and manufacturing of

1 the copyrighted products. That is to say, it, likewise,
2 retained an economic interest in proceeds derived from
3 exploitation of the copyright.

4 So *Peter Pan*, arguably is, on the facts
5 themselves, even closer than *SBK* because the parent
6 company, *Glass*, was joined as a co-plaintiff and
7 beneficial -- or equitable owner, who's the -- that was
8 the language at the time -- because it was the parent and
9 it shared the economic interest.

10 Now, I think it's also important to distinguish
11 the cases that are identified by Alcon. In the *John Wiley*
12 case, for example -- they identified, I believe, three
13 cases: *John Wiley*, *HyperQuest* and *Cortner*.

14 *John Wiley* was a bare assignment of the right
15 to sue to an agent. That's clearly not what we have.

16 *HyperQuest* was simply a nonexclusive licensee.

17 And *Cortner* was another royalty case where they
18 were found to be a beneficial owner.

19 So it's true that neither sides' cases have the
20 exact facts at issue here. But the rationale of *SBK* and
21 of *Peter Pan* identified the situation where you have a
22 prior legal owner who has a fiduciary interest, via
23 subsidiary, and is involved in the economics of the
24 copyrights. And those are the factors that create an
25 equitable interest under *Peter Pan*, and a beneficial

1 ownership under *SBK*.

2 Now, two points I'd like to flag here.

3 John Wiley, when it -- that's the case about the
4 photography agent who had the bare right to sue -- it
5 actually distinguishes the situation of an author when it
6 says -- in that case, the agent -- neither has, nor has
7 ever had, an exclusive right under the copyright.

8 And here we have a situation where we do have
9 the author who has an interest in the copyrights, much
10 like the legislative history case of the author who claims
11 royalty.

12 **THE COURT:** So I'd agree with you except you
13 gave it up.

14 Let me ask you: Why did you make the transfer
15 agreement effective April 2, 2007?

16 **MR. CHIN:** I actually don't know the answer to
17 that, but that covers the entire time range of interest.

18 So beginning April 2, 2007 through August, was
19 the time period in which all the work was done, and all
20 the work was transferred from and after that date.

21 **THE COURT:** Why did your client enter that
22 agreement after this litigation began? Why didn't it
23 enter before litigation began?

24 **MR. CHIN:** Once again, I apologize, I don't
25 know the answer to that in terms of the motivation for

1 entering into it.

2 But I should say this, that is, it is clear
3 that provides -- that we believe that that provides AMO
4 Development full legal title to seek all these -- seek the
5 claims, being a legal owner.

6 So it was a transfer to ensure that AMO
7 Development had full legal title to assert the claims.

8 **THE COURT:** And I think it is undisputed, it
9 does have full legal title; is that right?

10 **MR. FRANK:** For purposes of this motion, yes.

11 **MR. LOCASCIO:** I'd even go beyond it's not just
12 for purposes of the motion, Your Honor.

13 It's a question of, that's great, but they
14 can't seek lost profits for things they don't sell.

15 **THE COURT:** Right. So it's undisputed, they
16 are the -- they hold the legal title to the patent. And
17 that's consistent to what you allege in your second
18 amended complaint.

19 **MR. CHIN:** That's right. That's right. So --
20 and --

21 **THE COURT:** Let me just ask you this: What
22 exclusive right of the asserted copyrights does JJSV have
23 a beneficial ownership in?

24 **MR. CHIN:** Sure.

25 It is the exclusive right that AMO Development

1 has the fiduciary to JJSV and co-marketer, and so forth,
2 has in the copyright, in that AMO Development is able to
3 exclude everyone else.

4 And let me actually point out a particular --

5 **THE COURT:** No, wait. Wait, wait, wait. Time
6 out.

7 I thought by definition the beneficial owner
8 doesn't have the right to exclude.

9 **MR. CHIN:** The --

10 **THE COURT:** That's the legal -- that's where
11 the legal titleholder has to come in, right?

12 **MR. CHIN:** The exclusive right --

13 **THE COURT:** They have to have an economic
14 interest. I'm not sure that's really the right language,
15 but I'll give it to you.

16 They have to have an ownership in the exclusive
17 right, which is held by the legal titleholder, right?

18 **MR. CHIN:** They have to have an economic
19 interest and beneficial ownership of the exclusive right
20 held by the legal titleholder.

21 **THE COURT:** Right. But the key -- what I want
22 you to focus on is its ownership interest in the exclusive
23 right.

24 It's not in the legal titleholder. It's in the
25 exclusive right held by the legal titleholder.

1 **MR. CHIN:** That's right. And it's --

2 **THE COURT:** So tell me specifically -- like,
3 the fiduciary duty, that applies to ownership. That's
4 their -- they're an owner, so they've got fiduciary
5 duties.

6 I assume that's what you are getting at, right?

7 **MR. CHIN:** AMO Development has fiduciary duty
8 to JJSV. It derives from the whole notion of trust
9 principles in which beneficial ownership arose in the
10 first place.

11 **THE COURT:** Okay. I thought you were --
12 ownership of the company.

13 So where is the -- you're going to have to
14 really explain to me then; where's the beneficial
15 ownership in the, quote, "exclusive right"?

16 **MR. CHIN:** Got it.

17 So I think that that's actually answered by the
18 *Wiley* case. The *Wiley* case actually identifies where the
19 exclusive right is, and it says that the beneficial
20 owner -- the equitable interest derives value from another
21 person's use of an exclusive right.

22 So that's the purpose of an equitable interest,
23 and that's the purpose of a beneficial owner.

24 **THE COURT:** No. So actually what it says is,
25 "The interest must be one that derives its value directly

1 from another person's use of an exclusive right."

2 So where is that here? What is JJSV's
3 derivation of value directly from a person's use? I.e., a
4 license, right? That's really what it is, right?

5 Another person's use of the copyright, the
6 value, that's embodied in a license, right?

7 **MR. CHIN:** I believe in the *John Wiley*
8 situation, as well as in the classic situation of an
9 equitable interest, the exclusive use of the copyright is
10 essentially the legal title owner's interest in the
11 copyright and its exclusivity.

12 That is, the legal titleholder, AMO
13 Development, holds exclusive rights, and the beneficial
14 owner's interest is derivative of the legal titleholders'
15 exclusive rights.

16 **THE COURT:** Okay. So you want to characterize
17 it that way, I'm good with that.

18 Where does it directly flow from the exclusive
19 right? Where is that here?

20 **MR. CHIN:** Yeah. I mean, that flows from the
21 fact that -- as I mentioned, we have the four prongs that
22 I had identified. Namely, it is involved in the
23 commercialization, marketing, et cetera, of the
24 copyrighted products together with AMO Development. It --

25 **THE COURT:** But it's involved in the marketing

1 of all AMO Development's products. Where is it tied
2 directly to the exclusive use of the asserted copyrights?

3 **MR. CHIN:** So the legal titleholder, AMO
4 Development, holds -- as we've all agreed today, holds the
5 entirety of the legal title of the copyright. It is the
6 exclusive plus --

7 **THE COURT:** Right.

8 **MR. CHIN:** -- owner of the copyrights.

9 JJSV is involved, not only as a prior author
10 and original legal titleholder, but -- and -- but it also
11 has an economic interest in the products that are covered
12 by the copyright, like IFS products, via its joint
13 market -- involvement in marketing and so forth.

14 And AMO Development holds -- has a fiduciary
15 responsibility to JJSV to maximize that value in the
16 exclusive rights that AMO Development holds.

17 So AMO Development has the exclusive rights,
18 and JJSV, by virtue of being a beneficial owner through
19 its economic involvement, as well as through its --
20 through the fiduciary duty that AMO Development owes to
21 JJSV, JJSV then has a direct interest in those same
22 exclusive rights that are held by the legal titleholder,
23 AMO Development.

24 **THE COURT:** Okay. Anything else?

25 **MR. CHIN:** I'd like to point out one more

1 point. And that is, an argument was made by Alcon that
2 the assignment, itself, somehow neutralizes the beneficial
3 rights.

4 And I think the case law in *SBK*, in particular,
5 teaches us assignment of legal rights is not a forfeiture
6 of beneficial rights.

7 **THE COURT:** I agree. I agree with that.

8 I'm not sure they're making that argument. If
9 they are, we'll hear it.

10 But I would agree with you that -- I mean, *SBK*
11 spells out the paradigm situation is, you give up the
12 legal title, but you get a license. And that's where
13 you're getting something that is an economic interest that
14 is directly tied to the use of the exclusive right. That
15 makes sense to me.

16 **MR. CHIN:** And I guess --

17 **THE COURT:** Can you tell me any case that found
18 a beneficial right of copyright in a fiduciary duty?

19 **MR. CHIN:** Based solely on a fiduciary duty?

20 **THE COURT:** Well, actually where it even
21 discusses fiduciary duty.

22 **MR. CHIN:** It does not occur to me now. We can
23 identify that for you in correspondence. I believe it may
24 be in one of the cases.

25 But I can perhaps say this, and that is, there

1 is no case on either side that addresses this particular
2 circumstance.

3 We believe that *SBK* comes the closest to
4 describing the circumstances beyond this one example. We
5 know from the legislative history that the legislative
6 history gave the one example; a former author and owner
7 who receives a royalty. It's not an exclusive example,
8 but it's the example that shows up all over the case law.

9 **THE COURT:** Can you cite any other example
10 besides that where the legal title has assigned legal
11 ownership, but retains an economic interest in the form of
12 a license or royalty payment?

13 Can you cite any other case where something
14 other than those two circumstances accounted for justified
15 beneficial ownership?

16 **MR. CHIN:** I don't think there's a case that
17 discusses that one way or the other. If there were a
18 patent case, there would be a Federal Circuit case, I'm
19 sure.

20 But unfortunately, in the copyright context,
21 there has not been a case, so far as I'm aware, that has
22 discussed that example one way or the other.

23 So we have to rely on the teachings from *SBK*
24 and other cases to figure out what is the closest analogy.

25 Because we know certainly from the legislative

1 history itself, it is not limited to that circumstance.

2 **THE COURT:** Well, why do we know that
3 certainly? I mean, does it use the word "example"?

4 **MR. CHIN:** It does, in fact. It says -- I
5 jotted it down somewhere, but I believe it says something
6 to the effect of "including, but not limited to."

7 I can find that language. But --

8 **THE COURT:** Right. If you want to find it, go
9 ahead. Why don't you find that while your colleague
10 talks.

11 My guess is, for example -- first of all, I
12 think it's from House Report Number 94-1476, and it's
13 quoted in Wiley. And it describes a term "beneficial
14 owner" as, quote, "Including, for example, an author who
15 had parted with legal title to the copyright in exchange
16 for percentage royalties based on sales or license fees,"
17 unquote.

18 **MR. CHIN:** Yes. I think you found the cite
19 that I had in mind. "Including, for example" --

20 **THE COURT:** Right. I think the example is it's
21 an author. That's, I think, the point. It's an author
22 that's retaining financial interest in the form of
23 royalties. But I don't think the example is the
24 royalties.

25 But anyway, let me hear from the other side.

1 And if you can, if you can come up with a case
2 that cites anything other than a situation where the
3 beneficial ownership is found to exist based on something
4 other than royalties or license, you let me know.

5 **MR. CHIN:** Will do.

6 **THE COURT:** Thank you.

7 **MR. FRANK:** Thank you, Your Honor. Noah Frank
8 on behalf of Alcon.

9 If there is a case like the one you were
10 asking, it has not previously been cited. The only cases
11 finding that there was a beneficial owner deal with in the
12 scenario that you pointed out, author exchanges bare legal
13 title in exchange for royalties. *SBK* is that case.

14 Also, the question of beneficial ownership was
15 not actually in play. The question was: Can a beneficial
16 owner be found to be an infringer? And so not on point in
17 this scenario.

18 *Peter Pan*, the other case Mr. Chin cited, dealt
19 with a case of misjoinder. It didn't actually raise the
20 question of beneficial ownership.

21 What it said -- and 173 F. Supp 292 at 298, it
22 said: "Weaner failed to utilize the opportunity to
23 squarely raise the issue of misjoinder. Had the issue
24 been raised directly, plaintiffs would then be in a
25 position to present whatever facts it possessed to

1 delineate Glass' interest in the subject matter of this
2 litigation."

3 So that's the case they point to to say a
4 parent can have some sort of beneficial ownership
5 interest.

6 The case doesn't actually say it said that
7 issue is not in front of me.

8 **THE COURT:** Right. And, in fact, the quote I
9 have from that case is that joinder of a parent, quote,
10 "may represent justifiable action," unquote.

11 And that, quote, "trial evidence may show an
12 equitable ownership."

13 So it's -- and, of course, it is possible,
14 right, because you could have a parent retain a beneficial
15 ownership in the form of a royalty payment, right?

16 And that would be tied directly to the exercise
17 of an exclusive right of a copyright, as opposed to just
18 some general ownership of the companies and their revenue
19 streams across the board.

20 **MR. FRANK:** That's correct.

21 **THE COURT:** Right. And that's what's missing
22 here.

23 **MR. FRANK:** That's absolutely correct. If you
24 look at the transfer agreement, which Your Honor spoke
25 about, there's no retention of rights.

1 And, in fact, if there were a beneficial
2 ownership, that would be gone due to the transfer
3 agreement because it doesn't retain any sort of beneficial
4 ownership of anything.

5 **THE COURT:** Why do you think they transferred
6 it effective April 2, 2007?

7 **MR. FRANK:** My assumption is that -- their
8 allegations of copying relate to the version of the source
9 code that was around that time frame. I think they just
10 wanted to predate any potential allegations of copying.
11 But I don't know. They could have structured it
12 differently, and they didn't.

13 **THE COURT:** Now, they suggest -- and I don't
14 even remember what -- for some reason, I think it's
15 D.I.-490, which I can't remember what it is.

16 But they suggest that in that document, you
17 said something like, this transfer is not valid or it
18 doesn't count or -- that, you know -- is there any -- do
19 you have any recollection of them making that assertion
20 about you?

21 Did you ever take a position that the transfer
22 agreement's not valid or?

23 **MR. FRANK:** That's not ringing a bell,
24 Your Honor.

25 **THE COURT:** Okay.

1 **MR. FRANK:** One other thing I wanted to point
2 out. Mr. Chin cited to Cortner. Cortner, again, was the
3 standard retention of a royalty case.

4 And this whole theory on this beneficial
5 ownership really relates to this question of, well, JJSV
6 must have been a legal owner, and therefore they retained
7 something in the transfer agreement.

8 Well, the burden's on them to come forward with
9 that. And by the terms of the agreement, it's clear --
10 they wrote the agreement. And it's clear, they have no
11 rights.

12 And I'd also point Your Honor to their
13 answering brief at Page 7. And they say that -- and they
14 agree -- the mere existence of a parent subsidiary
15 relationship does not itself confer a parent company with
16 beneficial ownership.

17 They, then, go on to say that that's not what
18 we're doing here. Rather, it is a beneficial -- it,
19 JJSV -- is a beneficial owner in its own right because it
20 retains an economic interest in the copyrights derived
21 from the profits it receives from its exploitation.

22 But that could be said about any parent
23 subsidiary relationship. There's nothing in the record
24 that they point to where they receive something in return
25 for giving up a right. And so there is no beneficial

1 ownership in this case. And it's JJSV's burden to prove
2 it.

3 I'd also point out that Mr. Chin said what
4 matters is the intent of the parties.

5 And in their briefing, they make a lot of this
6 Rick Duff point and say, well, we became a legal owner
7 because of Rick Duff.

8 Well, if you look at the transfer agreement in
9 its Paragraph 123, the third line, it said, "The parties
10 have always intended that any copyright interests in such
11 computer programs used" -- I assume by the IFS systems --
12 "be held by AMO Development."

13 And then in the next "whereas" clause, it says,
14 "JJSV, nevertheless, may have acquired copyright
15 interests."

16 So they never claimed that they actually were a
17 legal owner and had given up legal ownership.

18 They said, "We've never been a legal owner. We
19 never meant to be a legal owner. And just in case that's
20 not true, we're not a legal owner. JJSV is not in this
21 case. AMO Development is the legal owner."

22 And I'm happy to answer any other questions you
23 have on this issue, but...

24 **THE COURT:** No. So the statement I had in mind
25 was this. It was a quote. This is in their reply brief,

1 that Alcon's position is that this transfer was
2 ineffective.

3 I don't know why I thought D.I.-90. It's
4 D.I.-458 at three to four. I don't know what that is.

5 Do you know what they're referring to?

6 Have you asserted at some point in the
7 litigation that the transfer agreement was not effect --
8 was ineffective?

9 **MR. FRANK:** I'm sorry, could you point me to
10 the page? This is their response brief to the summary
11 judgment?

12 **THE COURT:** D.I.-516 at Page 13. Or if you
13 have the hard copy of the reply brief, it's Page 9. It's
14 in Footnote 4.

15 **MR. FRANK:** Is this the motion to amend?

16 **THE COURT:** Yes. Motion to realign.

17 **MR. FRANK:** I'm not entirely sure what the
18 reference is. We did say that it was ineffective to
19 confer any right to pass damages. But I don't know what
20 they're referring to.

21 **MR. LOCASCIO:** Or actually, just give me the
22 cite once more. I think I found the brief you're
23 referring to.

24 **THE COURT:** D.I.-458, and it's at Pages 3 to
25 4 -- well, first of all, what is that?

1 **MR. FRANK:** This is the -- it's J&J's reply
2 brief in support of their motion for leave to amend.

3 **THE COURT:** No, no, that's D.I.-516.

4 **MR. FRANK:** Sure. D.I.-4 --

5 **THE COURT:** In Footnote 4, that J&J says,
6 quote, "Alcon's position is that this transfer was
7 ineffective," unquote.

8 They're talking about the transfer agreement,
9 and they cite D.I.-458 at three to four.

10 **MR. LOCASCIO:** And the sentence that carries
11 the page -- I'm looking at it -- is, "as of the effective
12 date, JJSV possessed no rights or interests in any of the
13 transfer copyrights, and thus was not a copyright owner
14 accruing damages."

15 But that section is a page long, and it's AMO
16 Development and J&J, we are bound by the transfer
17 agreement, which says, "it's effective, but you gave
18 everything away, so you have no ability for damages."
19 That's what three to four says.

20 **THE COURT:** All right. So you've never alleged
21 that this agreement is ineffective?

22 **MR. LOCASCIO:** We have not.

23 **THE COURT:** Okay.

24 **MR. LOCASCIO:** And if we're speculating as to
25 why they did it, if I can pipe in on that one because I've

1 got a different version.

2 I think, if look at the timing, they clearly
3 thought -- I assume they had some concern, does AMO
4 Development have standing? Is there some vestige? Maybe
5 this Duff, maybe somebody else. And they said, let's just
6 get it all over there, so they can be a party, just like a
7 patent case, going to shore up standing.

8 And then the benefit to them is: We're not
9 going to be in this. No discovery from us, no JJSV
10 hassle. Except, what somebody wasn't thinking about that
11 day was, we're going to seek IOL revenues which are not
12 sold and no profits come to any of the parties that are
13 actually plaintiffs.

14 **THE COURT:** Okay. All right. Thank you.

15 All right, Mr. Chin.

16 **MR. CHIN:** Your Honor, perhaps I can come back
17 to the direct economic interest point.

18 It occurred to me that -- and we've identified
19 one document that I failed to mention earlier, that does
20 indicate how JJSV has a direct economic interest.

21 **THE COURT:** Okay.

22 **MR. CHIN:** And I believe that is -- it's an
23 interrogatory response. But for purposes of summary
24 judgment, the Court should treat that as, at least
25 creating a disputed fact, in that we identified the flow

1 of money.

2 And I believe it is Exhibit 26.

3 **THE COURT:** Okay.

4 **MR. CHIN:** And in Exhibit 26 -- I apologize. I
5 was just handed this. I'm trying to find the cite as we
6 speak.

7 **MR. MORIN:** Eighteen, Page 18.

8 **MR. CHIN:** Oh, Page 18. Why don't I do this:
9 Why I don't I tell you what the point is, and then I'll
10 come back with the cite for you.

11 **THE COURT:** All right.

12 **MR. CHIN:** And the point is that, as we
13 identified in our interrogatory responses that the revenue
14 flows are owed to AMO Development, but are paid to JJSV.
15 That is, JJSV ultimately enjoys the economic benefit of
16 the moneys that were owed to AMO Development.

17 And that's not surprising, because JJSV --
18 because AMO Development has the fiduciary duty and
19 ultimately pays the money upstairs. It's part of
20 consolidated books.

21 **THE COURT:** By "fiduciary duty," you mean
22 because they're a subsidiary?

23 **MR. CHIN:** They are a subsidiary, yes.

24 **THE COURT:** And so you're saying they owe a
25 fiduciary duty to protect --

1 **MR. CHIN:** To manage IT responsibility. And,
2 in fact, due to the consolidated books of the company, the
3 money is, in fact, ultimately paid to JJSV.

4 And the passage, which I can't find the page
5 number for --

6 **THE COURT:** Time out. They ultimately paid --
7 it's ultimately paid it because it's an owner of the
8 company, AMO.

9 **MR. CHIN:** That's right.

10 **THE COURT:** Right.

11 **MR. CHIN:** Well, not only an owner, but also an
12 entity that directly participates in the marketing and
13 development of the products as well.

14 **THE COURT:** Of all of their products.

15 **MR. CHIN:** All of their products, including the
16 copyright products, and all the products that are subject
17 to damages.

18 **THE COURT:** Okay. All right. Anything else?

19 **MR. CHIN:** So that's a direct economic
20 interest.

21 **THE COURT:** All right.

22 **MR. CHIN:** But coming back to the example of an
23 author that is paid a royalty. As I indicated, sofar as
24 we're aware, unless we can -- that there is no case that
25 goes directly on point to either in either direction.

1 But I would suggest that the *Peter Pan* case,
2 which talks about the equitable interest, which is a --
3 the predecessor, shall we say, to the beneficial
4 ownership, talks about the equitable rights that flow from
5 being both a parent and --

6 **THE COURT:** I don't agree with you.

7 So I think what that case talks about is that
8 it posits that there could be a situation where a parent
9 could constitute an equitable owner, but it is certainly
10 not by virtue of it being a parent.

11 And I think it's undisputed, the case law says
12 "mere ownership of the company"; i.e., the parent,
13 subsidiary relationship is, by itself, insufficient to
14 establish beneficial ownership.

15 **MR. CHIN:** By itself, I agree.

16 **THE COURT:** Right.

17 **MR. CHIN:** But the *Peter Pan* situation also
18 involved a parent who was involved in the development,
19 marketing, and manufacturing of the products as well.

20 **THE COURT:** All right.

21 **MR. CHIN:** So --

22 **THE COURT:** So I'm going to make a ruling. I
23 do not believe that J&J has established that JJSV was a
24 beneficial owner of the asserted copyrights.

25 And it transferred, effective April 2, 2007,

1 its legal ownership of the asserted copyrights. It did
2 not retain a direct economic interest in the form of a
3 license or royalty, and so it did not have a beneficial
4 ownership interest in an exclusive right of the asserted
5 copyrights.

6 And JJSV argues that, first, it wasn't the
7 original legal owner of the copyright through the work of
8 its employee, Mr. Duff. All that work occurred after
9 April 2, 2007. And it transferred all of those efforts
10 and the beneficial ownership, or legal ownership that
11 would have followed from those efforts, as of April 2,
12 2007.

13 It did it retroactively. And both sides have
14 agreed it was able to do that retroactively. And it was
15 an effective agreement. No one is arguing that this was
16 an invalid transfer.

17 The second thing that JJSV posits as a theory
18 that would make it a beneficial owner is that it shares
19 management, sales and marketing functions for the
20 copyrighted products.

21 Well, it shares those functions generally with,
22 certainly, the copyrighted products and other products.
23 And that is really just another way of summarizing some of
24 the things it does for its subsidiary. And it is not tied
25 directly to the exclusive rights of the asserted

1 copyrights. And it's not a royalty. It's not a license.

2 Third, J&J relies on this fiduciary duty that
3 AMO owes to JJSV, but that's by virtue of its parent
4 subsidiary relationship. It is not tied directly to the
5 copyrights.

6 And so I don't think those facts would justify
7 characterizing JJSV as a beneficial owner of these
8 asserted copyrights. So therefore, it doesn't have
9 standing.

10 And then maybe we should discuss what
11 consequences flow from that.

12 I think one consequence that flows from that is
13 that the plaintiffs will be unable to assert a claim to
14 recover for damages associated with IOL sales and Catalys
15 sales, except for the period in which AMO Development sold
16 the Catalys machines. I think that's one consequence.

17 Is that right?

18 **MR. CHIN:** That that would be the consequence
19 if J&J --

20 **THE COURT:** I think. I don't -- I'm asking.
21 I'm looking for -- you know, the lawyers on both sides
22 here generally give ground when they have to. And so I
23 think that's a consequence, but it may not be.

24 What do you think?

25 **MR. FRANK:** I think that's uncontested at this

1 point.

2 **THE COURT:** And that's what I would have
3 thought. But do you want to, maybe, talk about that?

4 **MR. CHIN:** If you could give us just one
5 minute?

6 **THE COURT:** Sure.

7 **MR. MORIN:** Your Honor, I'll need a little bit
8 of time to confer with my team on that. Maybe we step to
9 other things to be efficient with Your Honor's time.

10 **THE COURT:** That's fine. Because what I think
11 what I'm going to do here is -- I mean, I'm going to make
12 some rulings that I can, based on the arguments of the
13 lawyers, and then -- well, and see where it leads us as
14 far as the pending motions.

15 Okay. But that takes care of that one issue.

16 **MR. MORIN:** I'd just rather not do that on the
17 fly. Let me meet with the team, need to confer with the
18 team.

19 **THE COURT:** That sounds good. That's sounds
20 like a very good thing.

21 All right. So maybe, let's do this. Just give
22 me one second.

23 Oh, actually, just to add further -- although,
24 if I have to, I will write something. It's dependent on
25 where this case goes, because I could always memorialize

1 in writing, you know, some of my thinking on this issue.

2 But just to further, I think the *SBK* case does
3 the best job of defining what a beneficial owner is. And
4 I relied on that. I relied on the *Wiley* case as well.
5 And I relied on the legislative history because
6 "beneficial owner" is not defined in the express language
7 of the statute.

8 And it's true, the beneficial -- or rather the
9 house report does cite, as an example, an author who had
10 legal ownership, assigned it away, but maintained an
11 economic interest in the exclusive right of the legal
12 ownership, which was in the form of royalties and license,
13 fees obtained from sales and licenses, rather.

14 And then I also relied on the many cases that
15 say a parent subsidiary relationship is insufficient to
16 establish a beneficial ownership. All right.

17 Okay. We could do next, I guess -- do you want
18 to talk about disgorgement next? Do you think that would
19 be, kind of, what the -- let's think about what's most
20 consequential.

21 I can also start -- we can start going through
22 the other two summary judgment motions. We have two and
23 three left, right?

24 **MR. LOCASCIO:** So that was two. I think you
25 largely did -- with the question of, what's the impact? I

1 think you just addressed Alcon Motion 2.

2 **THE COURT:** Yeah. Let's move to three.

3 **MR. LOCASCIO:** And three, which is -- whether
4 you think of this as Alcon Motion Summary Judgment 3 or
5 Alcon MIL-3, which is disgorgement, which is where, maybe,
6 the most briefing on this question, the legal question
7 happens, I'll take that and -- it feeds through both of
8 those. And I also think maybe even their MIL-4.

9 **THE COURT:** All right. Give me one second.

10 All right. What we can do on -- why don't we
11 start with -- let's go with Summary Judgment Number 3.

12 **MR. LOCASCIO:** That's fine, Your Honor.

13 And the reason I, sort of, maybe blurred those
14 together is, ultimately, the question of laches
15 application, which is in Summary Judgment 3 -- part of the
16 battle over that is, its role as an equitable defense.
17 And then the question is: Well, okay, is disgorgement in
18 and of itself equitable? Which is the nature of that
19 motion. But -- so I will take it as Summary Judgment
20 motion 3.

21 And at base, the battle here comes down to, is
22 laches available in copyright cases?

23 **THE COURT:** Well, hold on.

24 So I'm going to walk you through this because,
25 as I say, the lawyers have been great in this case, but,

1 boy, not with this motion.

2 And, you know, I'm going to tell you a
3 real-life story, so that you appreciate this, especially
4 the Delaware lawyers.

5 So about three hours into my work on this
6 motion, I decided to call it quits. Okay. So let me give
7 you some examples of why.

8 What's the title of the motion?

9 **MR. LOCASCIO:** "Laches Bars J&J's Claim for
10 Disgorgement."

11 Well, let me --

12 **THE COURT:** Hold up. Hold up, hold up. Sorry.
13 Forget what I was saying. I'm stuck on
14 Number 2. So we're not going to argue Number 2 right now?

15 **MR. LOCASCIO:** I believe we just did argue --

16 **THE COURT:** Well, we didn't argue it,
17 because -- not as far as I'm concerned. We argued an
18 issue that purveyed some issues.

19 But you think we've dispensed with Number 2?

20 **MR. LOCASCIO:** We could take a moment. But
21 Mr. Frank was going to do both, because the gating
22 question is JJSV's ability to be a party, have standing,
23 ergo seek lost profits.

24 **THE COURT:** Okay.

25 **MR. FRANK:** You're right. So in the briefing,

1 the idea that only AMO Development can recover its damages
2 was uncontested. They then argued that JJSV is a
3 beneficial owner.

4 But you've decided that issue, so I don't think
5 they're -- I think Summary Judgment 2 has been decided in
6 our favor.

7 **THE COURT:** Okay. Well, then we'll put it
8 aside. We'll go to Number 3 then.

9 **MR. LOCASCIO:** I cannot -- we'll look at the
10 title, though. So if I need to -- apologize, I'll do it
11 from the lectern.

12 **THE COURT:** Let's go to Number 3.

13 **MR. LOCASCIO:** Okay.

14 **THE COURT:** Now, this one is whether laches
15 bars the claim for disgorgement.

16 **MR. LOCASCIO:** Correct, Your Honor.

17 **THE COURT:** Okay.

18 **MR. LOCASCIO:** So I'd say the simplest way to
19 address this is: J&J takes a position that, I think, is
20 flatly inconsistent with *Petrella*, which says that its
21 unavailable. Laches is, full stop, unavailable. And
22 that's not what *Petrella* speaks to at all.

23 *Petrella* -- you flagged this a little bit in
24 the intro. *Petrella* says laches is not a threshold bar to
25 bringing a claim, under the Copyright Act, that was known

1 prior to the statute of limitations, which is set forth in
2 the statute. Full stop.

3 It then goes on to say that it's an equitable
4 remedy, and disgorgement is an equitable claim. And
5 that -- as you noted, the sentence says something to the
6 effect of, delay is always available. It's -- I think
7 it's strong as you said. It is always available as a
8 defense to injunctive relief and allocation of -- or
9 determination of the infringer's profits and their
10 apportionment. Okay.

11 And so in the face of that, I don't think
12 there's any question laches doesn't -- or it remains in
13 existence.

14 And really, the only other thing the folks on
15 the AMO side point to, is they have a cite -- and this
16 comes up in the MIL as well -- a pretty bullish statement
17 that says, this idea -- so I am going to blur the two,
18 unless you really tell me not to -- which is, the
19 questions of whether the -- it's a jury question or
20 whether it is a bench trial question, Your Honor.

21 And why I flagged it as a threshold, really
22 comes back to the question of: Is the relief of
23 disgorgement equitable?

24 And so it is smack in the middle of Summary
25 Judgment Motion 3, because laches is available. I don't

1 think there's any credible argument that is not.

2 Their arguments in response are things like,
3 well, it's not summary judgment worthy because we allege
4 willful infringement, for instance.

5 And on that the case law there says, no, it
6 actually has to not just be willfulness, but particularly
7 egregious conduct that would prevent you from coming to
8 the Court in equity. I don't think the facts support that
9 at all here.

10 Willful infringement by itself is insufficient
11 to preclude laches. That is the Crown case from District
12 of Delaware. It's Judge Thyng's decision.

13 And even then, they also point to -- they say,
14 vis-a-vis Alcon -- they say essentially the actions of one
15 party are imputed.

16 So they say, well, if we look at this issue,
17 everything done by the LenSx entities that have the former
18 employees, who took the code, now has to roll its way up
19 to Alcon Vision, because this disgorgement question is
20 around IOIs, as well.

21 And we talked about this a little bit last
22 week.

23 And their case -- they have to defenses: One
24 is, we avoid summary judgment because it's willful, not
25 the law.

1 **THE COURT:** Let me just hold you up, though.
2 Since I've held that -- if you're right that you win
3 Summary Judgment 2, are IOLs still in play for
4 disgorgement?

5 **MR. LOCASCIO:** So this one, to your point of,
6 how does this impact the case, we'll come back to you on
7 it as well.

8 Our summary judgment motion, to be fully frank
9 on this -- Summary Judgment Motion 2 is only actual
10 damages, which would not be disgorgement, are only
11 available to AMO Development, because there's no loss to
12 JJSV.

13 Okay. Because they don't have standing. So
14 their losses don't count.

15 The disgorgement question of, what can you --
16 Motion 2 does not, on its face, seek to take disgorgement
17 off the table for IOLs.

18 The Stamm motion -- you heard last week about,
19 where's the causal link here?

20 When you take that together with the
21 determination you just found to be JJSV, I think there is
22 a very fair question right now of: Okay, if JJSV has no
23 standing, can the entity that has not suffered any harm
24 from IOL sales disgorge on a copyright that doesn't cover
25 IOLs -- none of them do -- can they disgorge a -- in the

1 patent context conveyed sale downstream product?

2 I don't think there's any case anybody could
3 point to on the other side that allows for that. We do
4 not, to be fair, a summary judgment that asks for that
5 request.

6 We say it should come out because it's not
7 causal -- there's no causal nexus. Stamm shouldn't be
8 able to say it.

9 **THE COURT:** Right.

10 **MR. LOCASCIO:** It's ultimately a question for
11 Your Honor, because this is an equitable remedy of
12 disgorgement.

13 And so why I hesitated a little bit when you
14 asked is, this shouldn't then roll into the jury with a
15 3-billion or 770-million-dollar IOL disgorgement claim,
16 when there's no plaintiff with standing on damages, lost
17 profits, reasonable royalty, that could ever get that
18 money.

19 So have I answered your question on that?

20 **THE COURT:** Yes. And actually, you touched on
21 what I was going to hit on, like -- again, you should go
22 look at the title of your motion and then look at the --
23 well, not this minute. But look at the relief you asked
24 for in your order.

25 **MR. LOCASCIO:** Okay.

1 **THE COURT:** All right. But -- and that's
2 partly why I'm confused. And -- but I hear you, I think.

3 Okay. Let's -- sticking with Number 3, what
4 you are asking for in Summary Judgment Number 3 is a
5 declaration that laches bars plaintiffs from disgorging
6 your profits.

7 **MR. LOCASCIO:** Correct.

8 **THE COURT:** That's exactly what you're asking
9 for. Okay.

10 **MR. LOCASCIO:** Because of the delay, and they
11 knew. And they've known for, whatever the math comes out
12 to be, since 2014 on this.

13 And the only thing they, then, point to is:
14 Well, some of these FDA documents we didn't know about
15 until after we sued you.

16 And we point the Court to cases -- and I can
17 give them for Your Honor -- was, you knew enough to bring
18 a claim.

19 It's sort of the same argument they made
20 originally, Your Honor, which was, "We didn't know enough.
21 We knew there was copying." They stipulated they knew
22 there was copying. They had our product. They tore it
23 apart. They looked at the code the best they could, and
24 they knew they had a claim.

25 And if they had brought the claim then -- this

1 is akin -- it's a little bit -- it's a little different
2 from mitigation.

3 But if they brought the claim then -- well,
4 guess what? -- in the seven months after they brought the
5 claim in 2020, they knew all about the FDA issues.

6 And if they brought the claim in 2014, well,
7 they would have found out about it in 2015.

8 It's the same laches issue permeates all of the
9 copyrights, Your Honor.

10 **THE COURT:** Right. All right.

11 But just because you can bring to bear at the
12 remedial stage laches, doesn't mean you get to preclude a
13 claim of disgorgement, right? You agree with that?

14 **MR. LOCASCIO:** I agree with you that assertion
15 of laches, in and of itself, does not inherently grant you
16 summary judgment.

17 But on the facts here, we -- if there was a
18 dispute over what they knew, okay, well, then they get to
19 bring the claim, we'd ultimately, in a bench trial in
20 front of Your Honor on disgorgement and laches, hash that
21 out.

22 Our view is: We don't need to do that because
23 it's an undisputed fact that they knew there was copying
24 in 2014. It's an undisputed fact that they knew the
25 product was FDA approved. Obviously, it was out in the

1 marketplace, they got one.

2 And we know that within seven months of them
3 bringing a claim, six years late, they learned about the
4 remainder of their copyrights.

5 They've actually withdrawn -- and I don't know
6 if Your Honor's aware on the statute of limitations issue,
7 there were three classes of copyrights. There was
8 software code; there was the operator's manual, and there
9 were the FDA documents. And Your Honor said two of those
10 are disputed fact questions, whether the statute applies.

11 They've since ceded one of those because the
12 undisputed fact, it just wasn't briefed, Your Honor, is,
13 they had the operator's manual.

14 **THE COURT:** Okay. So do you think -- where
15 your argument falls, as I understand it is -- I mentioned
16 at the outset today, there's three rules, right, that come
17 out of Petrella.

18 The first rule is that you can never invoke
19 laches to preclude adjudication of a damages claim within
20 the statute of limitations.

21 You agree with that?

22 **MR. LOCASCIO:** As a threshold bar to pursue the
23 claim, yes.

24 **THE COURT:** Can never do it.

25 All right. The second rule is -- and this only

1 applies to equitable relief -- "in extraordinary
2 circumstances, laches may bar, at the very threshold, the
3 particular relief requested."

4 That's what you're trying to win here; is that
5 right?

6 **MR. LOCASCIO:** I would say no because I think
7 that is a gating question.

8 I view that as well as -- what Petrella says
9 there is -- okay. The case was dismissed and thrown out
10 because of the laches question, originally.

11 And what Petrella says is, okay, we're not
12 going to say it's like a statute of limitations. It's
13 something can be dealt with right at the outset.

14 But they say, in a particularly egregious case,
15 where if I knew about it for six years, and then I tried
16 to pull somebody off the market, or here in the case
17 that's cited there, like destroy buildings that are midway
18 through construction, that could be even a threshold
19 gating question, barring the claim in its entirety.

20 That's not we are asking for here. We're
21 saying --

22 **THE COURT:** No. It says, "Laches may bar, at
23 the very threshold, the particular relief requested by the
24 plaintiff."

25 It doesn't say the claim. It says -- and it's

1 referred -- it literally says, quote, "As to equitable
2 relief in extraordinary circumstances, laches may bar, at
3 the very threshold, the particular relief requested by the
4 plaintiff," unquote.

5 That's the second rule of Petrella.

6 The third rule is that, "A plaintiff's delay
7 can always be brought to bear at the remedial stage in
8 determining appropriate injunctive relief and in assessing
9 the profits of the infringer attributable to the
10 infringement."

11 So in other words -- the point would be is, you
12 absolutely get to bring in laches to mitigate or to
13 determine the amount of profits for disgorgement, for
14 instance. That, I think is clear.

15 But in order for you to bar them from even
16 seeking the relief, which is what you're seeking to do
17 here, you've got to fit within these extraordinary
18 circumstances, it seems to me.

19 **MR. LOCASCIO:** So I don't believe that Petrella
20 stands for the proposition that summary judgment is
21 unavailable for laches. Which, I think, that's where we
22 disagree on the second one, while I stopped it as a
23 threshold question on the extraordinary relief. Okay.

24 I think it cannot --

25 **THE COURT:** So you think "very threshold" means

1 what? Motion to dismiss?

2 **MR. LOCASCIO:** I think it means, like the
3 statute of limitations, like Petrella before the Supreme
4 Court weighed in, treated laches.

5 Meaning, we don't care what the facts are here,
6 but we know a fact, which is, it's -- it predates in this
7 case --

8 **THE COURT:** All right. Here's what I'm going
9 to do. And partly it's time, but I thought a lot about
10 this. I disagree.

11 **MR. LOCASCIO:** Okay. I understand.

12 **THE COURT:** All right. I think those are three
13 very, very clear rules.

14 So if you're going to win, you're going to have
15 to show that there are such extraordinary circumstances
16 here that, as a matter of law, laches bars, at the
17 threshold, disgorgement.

18 **MR. LOCASCIO:** Okay.

19 **THE COURT:** Now, there's two cases cited in
20 Petrella that are discussed, right?

21 I don't think -- I don't see how you meet
22 extraordinary circumstances given the Supreme Court's
23 discussion about those two cases in Petrella.

24 So give it your best shot.

25 **MR. LOCASCIO:** What I would say is, with

1 respect to laches on this motion on disgorgement, I would
2 say there's another aspect of their equitable relief
3 they're seeking, that's to take our product off the
4 market. I'd say that does fall within --

5 **THE COURT:** I thought -- wait. Do we have to
6 argue that today?

7 **MR. LOCASCIO:** We don't have to argue that
8 today.

9 **THE COURT:** That's going to be down the road,
10 right?

11 **MR. LOCASCIO:** It's down the road.

12 **THE COURT:** Okay. Then don't get there.

13 **MR. LOCASCIO:** Okay.

14 **THE COURT:** Let's just stick with disgorgement.

15 **MR. LOCASCIO:** But on the question of
16 disgorgement, I'd say their desire to seek, as of today at
17 least, \$3 billion in disgorgement for IOLs, having never
18 said anything about it to us, when they knew in 2014, is
19 extraordinary circumstances.

20 They have watched this market unfold, both for
21 Catalys, okay, and LenSx to the lead. And now they have
22 watched us sell IOLs that have nothing to do with the
23 product it's tied to, they say.

24 **THE COURT:** Is your argument that it's
25 extraordinary because it's so much money?

1 **MR. LOCASCIO:** I would say it's not the
2 dollar -- not the quantum, Your Honor. But the idea that
3 their -- their goal here is to take all of the profits
4 away from a competitor, having sat silently for
5 eight years.

6 And the economic level, you could say the --

7 **THE COURT:** When you say "all the profits," I
8 thought you guys told me last hearing that you actually
9 make \$13 billion a year in IOL sales, you don't make
10 three.

11 **MR. LOCASCIO:** These are all revenue numbers.
12 First of all, their numbers they're pointing to are
13 because they don't count costs in there. Recall, there's
14 still a battle over that.

15 **THE COURT:** Okay.

16 **MR. LOCASCIO:** But their -- yes, they have
17 found it. Not the biggest possible number to ask for.

18 But I would say the extraordinary remedy sought
19 in the cases discussed in Petrella, which is the
20 architecture case, the economic impact of that -- could it
21 be in excess of \$3 billion? I'd say it probably wasn't.

22 But at the end of day, their request here is
23 extraordinary, Your Honor, and so we think it qualifies.

24 Now -- but to be fair, we have a disagreement
25 as to Rule 2 of Petrella, which is, I think --

1 **THE COURT:** No, we don't have to repeat the
2 argument.

3 **MR. LOCASCIO:** I know.

4 **THE COURT:** We only have limited time. So
5 you've made it. I don't agree with you.

6 **MR. LOCASCIO:** I understand that.

7 **THE COURT:** You can make it later on. Okay.

8 **MR. LOCASCIO:** And then the other aspects that
9 they're arguing are that it's not available, I don't think
10 we need to spend any time on that because I think
11 Your Honor agrees with me that laches is available and
12 that the disgorgement relief is equitable.

13 So it would only then be a question,
14 Your Honor. I think the only question that separates my
15 summary judgment motion and where Your Honor is: Is,
16 okay, does this issue, these equitable issues of
17 disgorgement and laches and what they knew, have to, then,
18 be heard evidentiarily by Your Honor?

19 Because if it's available --

20 **THE COURT:** Now you're getting into the jury
21 question. Is that where you're going?

22 **MR. LOCASCIO:** I think that's the only
23 difference between whether summary judgment is applicable
24 here in the face of what are undisputed facts.

25 Because Your Honor's rules, under Petrella,

1 would be --

2 **THE COURT:** No, I disagree with you because --
3 here's why. Because I'm going to deny this.

4 I mean, I'm going to deny the motion because
5 you haven't, right now, laid out extraordinary
6 circumstances in my mind. I'm not saying you couldn't,
7 but you didn't do it.

8 The two cases discussed in the Petrella
9 decision, to give a preview, essentially, of what the
10 Supreme Court deemed to be extraordinary circumstances,
11 are the *Chirco* case from the Sixth Circuit and the *New Era*
12 *Publications* case from the Second Circuit.

13 And the Court spend most of its time discussing
14 *Chirco*. And in the *Chirco* case you had a situation where
15 the defendants were accused of using, without permission,
16 a copyright to plan and develop a housing development.

17 Basically, the copyright had to do with
18 architectural design. And after 168 homes were built and
19 109 were occupied, it was then that a copyright
20 infringement case was alleged.

21 So you had an extraordinary situation where you
22 had homes that had been built, third parties who were
23 completely innocent who were residing in the homes, and
24 there was a request to destroy the homes. And the Supreme
25 Court said that's extraordinary.

1 The second case was the *New Era Publications*
2 case. And that was where -- and it implicated First
3 Amendment rights -- a book was published. And it wasn't
4 until two years after the book had been published that a
5 restraining order was sought by the plaintiff based on a
6 copyright claim. And sought, as injunctive relief, total
7 destruction of all the books that were out there. Which
8 again, implicates third parties, who bought the books, had
9 no idea.

10 Now, you compare that to what was before the
11 Court in *Petrella*, which was much more similar to here, a
12 disgorgement of profits remedy. And what the Court said,
13 that the equitable relief that *Petrella* was seeking, for
14 example, disgorgement of unjust gains and an injunction
15 against future infringement, would not result in total
16 destruction of the film that was at issue, the *Raging Bull*
17 film, or anything close to it. That was the language of
18 the Supreme Court.

19 So you know, in other words, the *Raging Bull*
20 case before it in *Petrella* did not involve a request to
21 destroy the film itself or, to use the Supreme Court's
22 words, "anything close to it," unquote.

23 And then the Court went on and it said, quote,
24 "Allowing *Petrella's* suit to go forward would put at risk
25 only a fraction of the income MGM has earned during that

1 period, and will work no unjust hardship on innocent third
2 parties, such as consumers who have purchased copies of
3 the book."

4 And you haven't alleged here anything to
5 explain the impact of the income you lost. You've thrown
6 a number up there, 3.1 billion, but I don't know if that's
7 a fraction of the income that the defendants made.

8 I don't know the real hardship that the
9 defendants would suffer. I don't know the effect on third
10 parties.

11 All you've alleged is the -- this big, big
12 number. And it is a big number. But that's not enough.

13 And so at the summary judgment stage, I'm going
14 to deny the summary judgment motion.

15 But, under the third rule of *Petrella*, there's
16 no question that you are going to get the opportunity to
17 present in the -- on the issue of disgorgement, the delay
18 that the plaintiffs caused or took in bringing this suit.

19 All right. So the judgment is denied.

20 And if I have to, depending on how the case
21 unfolds, I may write something on this, but I think I've
22 articulated enough to explain why I'm denying the motion.

23 **MR. LOCASCIO:** Okay. I think it's another
24 threshold question that is tied to this, which is why I
25 tied them together, which is, ultimately, two motions in

1 limine raise the question of: Who hears the evidence on
2 disgorgement?

3 **THE COURT:** Right. I agree with that, and
4 also, what evidence they hear. We haven't decided that
5 with Stamm.

6 And that's why I'm going through the order I
7 am, because I think some of these may get resolved.

8 All right. Let's quickly then -- let's go next
9 to disgorgement. Is it a jury question? How should it be
10 presented?

11 **MR. LOCASCIO:** It's our Motion in Limine 3.

12 **THE COURT:** Right. All right. Go ahead.

13 **MR. LOCASCIO:** Thank you.

14 There's no question it's equitable under
15 *Petrella*. I won't revisit that.

16 **THE COURT:** It's not. That -- look, the
17 question is: Do you have any cases that say disgorgement
18 needs to be presented to a jury -- or sorry, can only be
19 presented to a judge? I take that back.

20 In other words, that where a Court says
21 point-blank disgorgement must be presented to a judge and
22 only a judge.

23 **MR. LOCASCIO:** So I want to answer your
24 question, which is yes, but there's two prongs to that.

25 The first is, I think, all of the cases, except

1 perhaps the one case out of Eddy, Texas that was -- that
2 my colleague cited, say it's a question for the Court, and
3 you can send it as an advisory verdict.

4 So the law is, it is a question for Your Honor
5 to decide with findings at some point either in the --

6 **THE COURT:** What's the best case you have that
7 point-blank says that disgorgement must be decided by a
8 judge?

9 **MR. LOCASCIO:** Okay. I want to give you -- I'm
10 going to give you three.

11 **THE COURT:** Okay.

12 **MR. LOCASCIO:** Okay? First one is, *Fair Isaac*,
13 District of Minnesota, 408 F.Supp.3d 1019.

14 **THE COURT:** Right.

15 **MR. LOCASCIO:** And the reason I started with
16 that, even though it is District of Minnesota is, it's a
17 copyright case that then cites to the Federal Circuit,
18 *TAOS* 895 F.3d 1304, which says there is no Seventh
19 Amendment right to disgorgement of profits. It walks
20 through -- it's a trade secret case, and it walks through
21 the patent, trademark and copyright cases to say, for
22 disgorgement, where it is not a proxy -- and there's no
23 dispute it's not a proxy here -- it's not a jury question,
24 it's a question for the Court.

25 And then third is actually a case that declines

1 to give a -- even have an advisory verdict on this, and
2 it's *Assessment Technologies* -- is also in our briefing --
3 2022 Westlaw 588889 on this. And --

4 **THE COURT:** Which court is that?

5 **MR. LOCASCIO:** District of Kansas.

6 **THE COURT:** That's Judge Robinson. Okay. Yes.

7 **MR. LOCASCIO:** And so what's happened here is,
8 you have *Petrella* which says equitable, and then in the
9 wake of *Petrella*, you say: What are the other cases that
10 come after that?

11 And *TAOS* is one from the Federal Circuit that
12 looks at this, and then now district courts have treated
13 it.

14 It has not gone back up in any way for a Court
15 of Appeals to, specifically in a copyright context, look
16 at this.

17 But the cases on the other side -- and their
18 argument is -- they start with *Beacon* and *Dairy Queen*
19 antitrust case, trademark case from the late '50s, early
20 '60s, that just say "if you seek accounting," that doesn't
21 negate the jury, right, on the underlying claim. Okay,
22 that's fine.

23 But on the issue of: What about the
24 disgorgement remedy? The only case they really can point
25 to then is this *Kraft* case -- or *Krofft* case, the

1 *Sid Krofft* case from the Nine Circuit, which says in a
2 copyright case, they're going to treat disgorgement as
3 a -- not a jury issue.

4 Except, if you look at *TAOS* and *Fair Isaac*,
5 both of them walk through the history and take issue with
6 that, because that case is based on a decision that wasn't
7 actually disgorgement, and the *Krofft* case actually wasn't
8 seeking disgorgement in the same way they are here either.

9 **THE COURT:** Okay.

10 **MR. LOCASCIO:** So those are the best cases on
11 that.

12 And then the other piece of this MIL as to why
13 it's not adversarial -- not okay to send in advisory
14 verdict is what you identified, it's *Uniloc*. Federal
15 Circuit saying, if you throw out a big number, sort of
16 level set everyone to a smaller number.

17 Which is why, if you sought billions of dollars
18 in disgorgement -- as they do here -- but you had
19 \$100 million, \$200 million, \$50 million in actual damages,
20 okay, the Court can decide disgorgement. You shouldn't
21 have the jury hearing all that, because then, guess what?
22 The goal -- I mean, everybody knows the plan here.

23 The plan is, have the jury say, well, somewhere
24 around the middle there seems like a reasonable number
25 with two big companies. And that's why it's prejudicial.

1 **THE COURT:** Okay. Thank you.

2 **MR. LOCASCIO:** Thank you.

3 **MR. MORIN:** May I respond, Your Honor?

4 **THE COURT:** No. Just joking.

5 **MR. MORIN:** My mom taught me to be polite.

6 Sorry.

7 **THE COURT:** Of course you may.

8 **MR. MORIN:** Okay. I have a lot to say on the
9 merits, but why don't I start with where my friend
10 finished.

11 His lead case was *Fair Isaac*. He said it's his
12 best case, Number 1. And he says we shouldn't present
13 disgorgement to the jury because they'll hear a big
14 number, and that will put them in a position where they're
15 desensitized.

16 The *Fair Isaac* case last week, just last
17 week -- and my friend referred to it. May I pass up last
18 week's decision? There was a subsequent decision that my
19 friend referred to.

20 **THE COURT:** Yeah, sure.

21 **MR. MORIN:** The issue of bifurcation came up,
22 whether the judge should hear it separately.

23 Oh, I'm sorry. May I?

24 **THE COURT:** Yeah, please.

25 **MR. MORIN:** Whether the judge should hear it

1 separately. The *Fair Isaac* case involves FICO, you know,
2 the credit scoring agency. The disgorgement revenue
3 number was \$45 billion and the damages requested were 27
4 or 34 million. I have it here.

5 And the Court said, forget desensitization,
6 there's overlapping issues, witnesses, all that type of
7 thing, and jury instructions and the rest of it can deal
8 with it.

9 And it distinguished *Uniloc*, actually. Because
10 whatever you say is appropriate to send on disgorgement,
11 Your Honor, is legally fair.

12 *Uniloc*, the point was, the entire market value
13 rule doesn't make the \$19 billion against Microsoft
14 relevant for anything.

15 They made the point here, the same judge on
16 their Number 1 case says, it's no problem hearing
17 \$45 billion on the revenue number even if your damages
18 number is less on the advisory verdict.

19 But let me get to the main question presented.

20 I'll take a moment if Your Honor wants to
21 glance at that or has some questions about that.

22 **THE COURT:** Just give me one second. Yeah,
23 please.

24 **MR. MORIN:** That judge, but the way, addresses
25 *Uniloc* and explains why it's okay in that decision.

1 Uniloc discussion is on Page 13, Your Honor. I
2 didn't mean to interrupt you.

3 **THE COURT:** No, no. That's good. Thanks.

4 All right. Just from skimming it right away,
5 the judge is, I think, going to say that the \$45 billion
6 is relevant to the royalty, to the damages. So it's going
7 to come in.

8 **MR. MORIN:** What he's saying -- and part of
9 that is that there's overlapping evidence. Here, for
10 example, in the reasonable royalty --

11 **THE COURT:** Wait. Hold on. Am I right?
12 Because I'm skimming this. Is that right?

13 Is that what he's saying, that the 45-billion
14 figure is going to be relevant to the damages request,
15 which is going to be made before the jury?

16 **MR. MORIN:** Yes, with a qualification.

17 **THE COURT:** All right.

18 **MR. MORIN:** If I may.

19 **THE COURT:** Yeah, please.

20 **MR. MORIN:** The answer is yes. I'll answer
21 your question yes.

22 It's a little bit of technicality. What they
23 agreed would go before the jury is \$13 billion. And he
24 said, "^13, 45, what's the difference at the end of the
25 day? A little bit."

1 But, Your Honor, my point on that is, in the
2 reasonable royalty analysis, in the same exact way, our
3 expert will be talking about the revenues in the royalty
4 context.

5 **THE COURT:** So I'm going to get to that because
6 that's what -- so that, for me, is like a threshold issue.
7 Is, I think the defendant has to admit that if
8 disgorgement is a proxy, or if the total revenues are a
9 proxy for damages or involved in the damages calculation,
10 it's going to get in front of the jury anyway.

11 But what your friend did say was, pretty early
12 on in his argument was that, we don't have that situation
13 here.

14 He said it's not a -- the words he used was,
15 it's not a proxy for damages. That doesn't mean it's not
16 going to be cited in your expert damages opinion.

17 So before you do anything, why don't you tell
18 me -- we talked about this in the beginning -- what are
19 the -- what's a three-headed monster?

20 And if at the end of day this gross revenue
21 figure is coming in any way, let me know.

22 **MR. MORIN:** Yeah. So the three-headed
23 monster -- still hoping it has three heads.

24 The three-headed monster is disgorgement, which
25 is the -- obviously, the infringer's profits, is one

1 bucket. And actual damages has two components. So
2 there's three heads.

3 The lost profits component that we've talked
4 about a little bit, and the reasonable royalty component
5 that we haven't talked about today, and that they haven't
6 moved on.

7 In the reasonable royalty, as in almost all
8 reasonable royalty cases, she looks at the Book of Wisdom
9 and one of the factors in what the royalty would have been
10 is the revenues that they've achieved from the sales, the
11 infringer's profits, basically.

12 Paragraph 277 on, in her opening expert report,
13 talk about that. They have haven't objected. They
14 haven't moved to strike, anything like that.

15 **THE COURT:** So is the number coming in?

16 **MR. MORIN:** Yeah, the number is coming in.

17 **THE COURT:** All right. Before we have any
18 further argument, then --

19 **MR. LOCASCIO:** I couldn't disagree more
20 strongly. The reasonable royalty is not on IOLs. This
21 IOL number is not part of the reasonable royalty
22 calculation.

23 **THE COURT:** All right. So why don't you show
24 me the report, because this is like -- for you guys to be
25 disagreeing, I should be --

1 **MR. MORIN:** Right. And I think I can -- I
2 think I can -- the IOL number is not in there.

3 When we talk about the overall sales of LenSx
4 and all the other things for disgorgement, those numbers
5 are in there.

6 I want to be very, very clear on that. That's
7 true.

8 **THE COURT:** Wait. Those numbers are or are not
9 in there?

10 **MR. MORIN:** Are in there.

11 The LenSx sales numbers, Paragraph 277 of her
12 opening report, those numbers are on there. She does not
13 quantify the IOL numbers in the royalty.

14 **THE COURT:** Okay. All right. This is all
15 about IOL numbers.

16 **MR. MORIN:** That part, that's true. And he's
17 accurate on that, just to be clear.

18 **THE COURT:** Okay.

19 **MR. MORIN:** But the other thing that the
20 *Fair Isaac* case does --

21 **THE COURT:** But wait --

22 **MR. MORIN:** Yeah. Sure.

23 **THE COURT:** -- if I ruled that JJSV can't
24 recover, then IOL -- are IOL sales out? I mean, let's --
25 so why -- maybe we better resolve that. Because to me,

1 they would be out if JJSV isn't part of the...

2 **MR. MORIN:** No, Your Honor. And that's where I
3 hope to clarify and be helpful.

4 **THE COURT:** All right. Why don't you do that
5 first, address that.

6 **MR. MORIN:** Okay. So disgorgement and actual
7 damages are obviously two different things.

8 **THE COURT:** Right.

9 **MR. MORIN:** On the lost profits side of the
10 equation, you've ruled that JJSV can't recover its
11 profits. It can't say, "I've been harmed by this amount."

12 Disgorgement is a creature of copyright law in
13 part because oftentimes plaintiffs haven't been harmed,
14 and therefore -- even JJSV hasn't been -- is not in the
15 case, and saying maybe AMO Development can't recover all
16 of JJSV's.

17 It's not unusual. *Petrella*, all these other
18 cases -- someone write a song, someone does something and
19 it gets stolen -- disgorgement is there for the
20 circumstance where you can't prove your actual damages or
21 where your actual damages won't do the trick.

22 It's there for the very reason that it may be
23 the case that even though JJSV is not in the case and
24 can't recover its lost profits, that if someone has stolen
25 code, as we contend -- and it's not at dispute right

1 now --

2 **THE COURT:** Right.

3 **MR. MORIN:** -- and is profited by its theft, we
4 don't have to prove disgorgement with any harm to
5 ourselves.

6 So JJSV coming out of the case and not being
7 able to claim its damages -- which I think we agreed on at
8 the beginning of argument -- does not affect the
9 disgorgement issue.

10 It's a totally different issue of what they
11 made --

12 **THE COURT:** Okay.

13 **MR. MORIN:** -- and what they have to disgorge.
14 Have I clarified that? Explained that well enough?

15 **THE COURT:** You have.

16 All right. In other words, just the way I put
17 it in my own words is, your point's going to be, hey,
18 disgorgement is unjust enrichment. It could include IOL
19 sales, regardless of whether JJSV is a party or whether
20 it's got a beneficial ownership, period.

21 **MR. MORIN:** The question is going to be: How
22 much have they benefited from their infringement, right?
23 And then there may be an apportionment and there may be
24 money taken out, but it's unjust enrichment, kind of
25 basic, idea.

1 **THE COURT:** All right. Hold on.

2 **MR. MORIN:** Yeah.

3 **THE COURT:** Does somebody have a copy of
4 504 (b) ?

5 **MR. MORIN:** Sure. I can pass one up if it's
6 helpful, Your Honor. Would you like a copy?

7 **THE COURT:** Yeah, please. Oh, no. I have
8 mine.

9 Okay. I'm with you. Go ahead.

10 **MR. MORIN:** Okay. So -- and by the way, it
11 makes sense in copyright cases, because lots of the time
12 someone gets something stolen. You know, I write a song.
13 It's hard to imagine. I can't really show I would have
14 done anything with the song.

15 Big Pimpin' is the example, right? The
16 Jay-Z --

17 **THE COURT:** I know.

18 **MR. MORIN:** There is a famous Jay-Z situation.
19 But I write a song, Mike Morin writes a terrible song and
20 Kirkland goes out and uses it in an advertisement. I
21 can't prove that I was actually damaged by that. I am
22 entitled to disgorge the profits.

23 And I'll only make one little side comment.
24 There's a lot of victim blaming going on here. They stole
25 our code and put it in their products. I mean, at the end

1 of day, we're entitled to relief for their theft and what
2 we think is willful theft. And that's what it's all
3 about.

4 **THE COURT:** All right. I'm with you. So then
5 the bottom line is, I got to address this jury question no
6 matter what.

7 **MR. MORIN:** That's correct.

8 **THE COURT:** All right.

9 **MR. MORIN:** And so the two principles come out
10 of that. The first is, even their lead case -- and that's
11 what I was going to get to.

12 **THE COURT:** Oh, yeah. The Minnesota one,
13 right? Okay.

14 **MR. MORIN:** The Minnesota case. Even in that
15 lead case, there were two comments.

16 The first is that the amount of money is not an
17 excuse. *Uniloc* was a situation. You're going to lay in
18 front of the jury whatever you think is relevant to the
19 damages of the claim.

20 The *Uniloc* decision basically said that
21 \$19 billion wasn't relevant to anything in the case. And
22 that's what it says on Page 13.

23 But the more important point, I think, is on
24 Pages 16 to 17, Your Honor --

25 **THE COURT:** Yeah.

1 **MR. MORIN:** -- where there's basically an
2 acknowledgement here -- and this was the point I led on --
3 which is, whether you call it advisory or whether you just
4 send it to the jury, even their best case says, I don't
5 know what the Eight Circuit is going to do with this
6 thing.

7 And so, Your Honor, I will tell you -- and I'm
8 going to make a good pitch, I think, if you'll let me, as
9 to why this is a jury issue. And I think it's been
10 decided that way. I'm going to make the pitch to you.

11 But one thing is clear, and our friends agree,
12 this hasn't been addressed by the -- the Federal Circuit
13 would be applying Third Circuit law directly.

14 And if you don't have a record of this thing,
15 you've got a new trial if someone upstairs disagrees with
16 you, as opposed to taking a record of it.

17 So you don't actually have to decide the issue
18 now. If you decide it for us, it would be a pure jury
19 issue. If you decide against us, it's an advisory.

20 The Sysco Court, Judge Freeman, she said, "I'll
21 send it to the jury and I'll sort it out later, basically,
22 whether it's advisory or a permanent."

23 So let me get to a quick response, if I may,
24 because I think it's an important and interesting issue on
25 whether it goes to the judge or the jury, Your Honor, if I

1 may.

2 **THE COURT:** Uh-huh.

3 **MR. MORIN:** So Your Honor is familiar that
4 there's two ways, of course, that a case can end up in
5 front of the jury. One is a statutory and one is
6 constitutional.

7 And I would tell you that I think
8 Judge Payne -- familiar with Judge Payne in the Eastern
9 District of Texas -- he wrote a *Hoffman* decision a year
10 and a half ago. And I'm not citing it for the weight of
11 the Eastern District; although, I think he's a fine judge
12 who we both appear in front of a lot.

13 He goes through really thorough, really good
14 analysis. And his point is the same point that *Feltner*
15 makes from the Supreme Court, is: If you have a statute
16 that's possible to be interpreted to avoid a
17 constitutional issue, the question of constitutional
18 avoidance, you should do it.

19 And you go to 504(b). And what he did is, he
20 went to 504(b) and he says, "Unlike 504" -- and I don't
21 know if you only have 504(b) or if you have the others.
22 But he says, "Unlike in the other provisions, it does not
23 use the word 'Court' and who is going to decide this. The
24 word 'Court' is absent, unlike in other provisions."

25 And then he goes on to look at the *Feltner*

1 decision, which is a Supreme Court case, Your Honor. Are
2 you familiar with *Feltner*, if I may.

3 So the *Feltner* decision is looking at 504(c),
4 and it says, "We don't see the word 'Court' here" --
5 right? -- "We have the word 'Court' here," I'm sorry. In
6 504(c), it says, "the Court shall decide."

7 And the Supreme Court, the Supreme Court says
8 in a recent decision, when they look at 504(b), which is
9 our provision, it says, "The Copyright Act does not use
10 the term 'Court' in the subsection addressing words of
11 actual damages and profits, see 504(b), which generally
12 are thought to constitute legal relief."

13 This is the Supreme Court talking about 504(b).

14 And the whole point with Judge Payne is, he
15 says, I respect the judge in Minnesota, and there's all
16 sorts of ways to read this. But if there's a way to read
17 it to avoid the constitutional issue, he says, we do it.

18 And he also says that it's an odd
19 combination -- it would be an odd combination to have a
20 legal remedy of damages in the same provision side by side
21 with, right -- connected with the protean relief of --
22 it's what the Supreme Court has called it -- of
23 disgorgement and say that the jury is not deciding that
24 either.

25 And then his third rationale -- and I'd implore

1 Your Honor to read the *Hoffman* case because it -- the
2 *Hoffman* case -- is that he cites ten cases where the
3 Courts have sent this issue to the jury. And he said
4 we're upsetting settled law here, where this has been
5 happening, including cases that have analyzed it. And my
6 friend identified one of those, the *Sid and Marty Krofft*
7 case.

8 So he says we can deal with it on a statutory
9 basis. And then he says -- on the constitutional
10 question, he says -- Judge Payne says, "I think it also --
11 you have a constitutional right, but I don't have to get
12 there."

13 Now, if we're going to go to the constitutional
14 question, if Your Honor is going to consider it, we have
15 the advantage. He talked about a Federal Circuit case
16 that dealt with trade secrets. Which, by the way, trade
17 secrets are a little bit different. They have their
18 principles and equity and their derivation in equity.

19 But he talked about the Federal Circuit case.

20 I'm sorry, I'm going too fast, aren't I?

21 He talked about the Federal Circuit case.

22 If you look at another Federal Circuit case
23 in *Re Technologies*, looked back at the *Root versus Railway*
24 Supreme Court case and says, it's an issue for the jury.
25 It's an issue of law. So the Federal Circuit had gone

1 both ways.

2 You're fortunate enough to be sitting in the
3 Third Circuit, which has answered this. The *Kennedy* case
4 answered this question --

5 **THE COURT:** Is it the *Lakso* case?

6 **MR. MORIN:** Yeah, the *Lakso* case.

7 **THE COURT:** I don't agree with you. It didn't
8 answer that question.

9 **MR. MORIN:** Well, okay. Let me say why it's
10 instructive and why I think it's answered it. And then,
11 of course, you're the judge, you can disagree.

12 In that case -- it was a patent case. And in
13 that case, it clearly says at the beginning they were
14 asking for both damages and accounting for profits, right?

15 And then the Court did the same thing that the
16 Supreme Court did in the *Dairy Queen* case and says, even
17 if you can kind of call it equitable in some way, that
18 doesn't mean you don't go to the jury on the issue.

19 And it says, "No distinction could be drawn
20 that would justify recognition of the right to jury trial
21 for damages and denial in a claim for profits on the
22 theory that damages are recoverable in an action at law,
23 whereas profits have their origin in equitable
24 principles."

25 And they go on to conclude, just like

1 Justice Harlan in the *Dairy Queen* case, that the jury is
2 perfectly capable of dealing with these issues on
3 accounting and they should go to the jury.

4 And the same thing in the *Dairy Queen* case and
5 Justice Harlan's --

6 **THE COURT:** Because time's at issue.

7 **MR. MORIN:** Yeah.

8 **THE COURT:** Look, I've read *Lakso*; I've read
9 *Dairy Queen*. I don't think they stand for that principle.
10 I think what they stand for, the principle is that there
11 was an old rule, that if you had legal and equitable
12 claims --

13 **MR. MORIN:** Right.

14 **THE COURT:** -- and that if the equitable claims
15 were predominant, then you -- under the old rule, you lost
16 the right to a trial to a jury.

17 **MR. MORIN:** Right.

18 **THE COURT:** And what Justice Black comes along
19 in *Dairy Queen*, he says, no, no, no. If you've got some
20 legal claim there, even if the equitable claim
21 predominates, you still have your right to trial by jury.

22 And *Lakso* is just recognizing that and
23 explaining it. And so that's why the issue in *Lakso* is
24 whether or not the lability claim, the infringement, which
25 is indisputably a right to trial by jury was lost by the

1 presence of an equitable claims.

2 Let's just move on because I've got limited
3 time.

4 **MR. MORIN:** May I have one sentence on that?

5 **THE COURT:** No. Come on.

6 **MR. MORIN:** Okay.

7 Anyway, so in any event, Wright & Miller, and
8 the other treatises credited for that issue.

9 And Your Honor has read all these cases, so I
10 know you have limited time. I have said my peace. I
11 would --

12 **THE COURT:** All right. Here's what I'm going
13 to do. I'm going to think about this one for some more.
14 Let's go through, quickly, the other motions in limine I
15 think we can dispense with.

16 Actually, do you want to say -- it's your
17 reply, so you can go ahead.

18 **MR. LOCASCIO:** I have two points I want to say
19 to that, Your Honor.

20 **MR. MORIN:** Thank you, Your Honor.

21 **THE COURT:** Thank you.

22 **MR. LOCASCIO:** On the jury question, the motion
23 in limine we're talking about, my colleague just said,
24 well, the Federal Circuit has gone both ways, except In Re
25 Tech licensing is pre-Petrella; TAOS is post-Petrella,

1 which says it's equitable. And it walks through each
2 regime.

3 So I think the *TAOS* case from the Federal
4 Circuit tells us exactly what would happen to this on
5 appeal. It's an issue for Your Honor.

6 *Feltner* actually says it's not a question of
7 statutory construction.

8 And then the two other cases I pointed to, the
9 District Court case from Kansas, walks through how that's
10 dicta.

11 And, ultimately, *Petrella* comes after *Feltner*,
12 and couldn't be clearer that this is equitable in
13 Footnote 1 of the *Petrella* --

14 **THE COURT:** Right. There's no dispute it's
15 equitable. You don't dispute the disgorgement is
16 equitable, do you?

17 **MR. MORIN:** I do for the purposes of
18 disgorgement.

19 In that footnote, I think what they're talking
20 about is the laches aspect. It says it's protean. It has
21 aspects from each. And it says, "for the purposes of
22 this. It is for the purposes of this, we'll treat it as
23 equitable."

24 I believe -- and by the way, the equitable
25 label is not necessarily dominating *Dairy Queen*, and the

1 other cases say that.

2 But I don't think it's so clear that on the
3 question of disgorgement that it is -- itself is -- they
4 say it's confusing and protean, I think what they're
5 referring to is laches in that point in time, because
6 that's an issue --

7 **THE COURT:** -- referring to by protean.
8 They're quoting the restatement.

9 **MR. MORIN:** Yeah.

10 **THE COURT:** In the commentary, the restatement
11 is talking about how it's protean. It varies. It's fact
12 specific --

13 **MR. MORIN:** That's right.

14 **THE COURT:** -- and you've got to figure it out.
15 Sometimes it's legal, sometimes it's equitable, sometimes
16 it overlaps. And they're talking about unjust enrichment.
17 I don't know.

18 All right. Anything else?

19 **MR. LOCASCIO:** Yes. To be clear, it says,
20 "This remedy is equitable." That's Footnote 1 of
21 *Petrella*.

22 **THE COURT:** Right. And his point is, it does
23 say, "in this case."

24 So, but I think you have the better reading.
25 They clearly say -- I think *Petrella* makes clear,

1 disgorgement for copyright cases is equitable.

2 **MR. LOCASCIO:** And the last point on *Petrella*
3 is, at 687, it said, "Should *Petrella* ultimately prevail
4 on the merits, the District Court, in determining
5 appropriate injunctive relief and assessing profits, may
6 take into account delay in commencing suit."

7 So *Petrella* even contemplates who will
8 ultimately determine the profits, the Court, at the same
9 time it does injunctive relief. There is no question,
10 obviously, is not a jury issue.

11 **THE COURT:** Right.

12 **MR. LOCASCIO:** And...

13 **THE COURT:** Okay.

14 **MR. LOCASCIO:** That's all I have on that,
15 Your Honor.

16 **THE COURT:** Yeah. I'm very much leaning
17 towards it does not go to the jury. I need to think just
18 a little bit, but that's -- just so you'll know.

19 I'll let you know for sure by February 6.

20 **MR. LOCASCIO:** One other point I do want to
21 make on this is the advisory verdict argument, the
22 *Fair Isaac* case.

23 *Fair Isaac*, as you even saw in just your skim
24 of it, says, the defendants agree, the big numbers going
25 in front of jury, and it's relevant to the -- in that

1 case, a royalty calculation. That's not this case.

2 **THE COURT:** Right. Because the IOLs are not
3 going to be included.

4 **MR. LOCASCIO:** Correct, Your Honor.

5 **THE COURT:** Right. But now I'm just
6 wondering -- well, no, that's right. Because your
7 position and the plaintiffs' position is, notwithstanding
8 my ruling today about JJSV, they still want to bring in
9 the big number for disgorgement.

10 They think they can, is my inclination,
11 especially if it's -- certainly, they can bring it if it's
12 front of me.

13 **MR. LOCASCIO:** If it's in front of you --

14 **THE COURT:** You don't care.

15 **MR. LOCASCIO:** -- this is obviously much less
16 of an issue.

17 If it's in front of the jury, we will come back
18 to you on the question of -- and there's two questions, as
19 I see them. If it's front of a jury, this is a *Uniloc*
20 situation that I don't think the *Fair Isaac* decision,
21 there it's different than here.

22 But also, the availability or eligibility of a
23 case where JJSV has no beneficial ownership for the
24 remaining entities to disgorge on IOLs, because they have
25 a disgorgement argument for FLACS machines, and we're not

1 taking issues with that. FLACS machines being the LenSx
2 machine.

3 **THE COURT:** Yeah, yeah. But, I mean, he's got
4 a point. I mean, disgorgement is an equitable remedy.
5 It's fairness. And it's the -- the unjust enrichment is
6 what's being addressed. And you can argue that should
7 include convoyed sales, all sorts of things.

8 We don't have to deal with it.

9 I'm putting a hold -- I'm withholding judgment
10 on the third motion in limine. My inclination is to not
11 let disgorgement go in front of the jury.

12 I'll think about it some more. We'll talk
13 about February 6.

14 Let's quickly run through the other motions in
15 limine. I think we can make some progress.

16 Start with Number 1 for the plaintiff.

17 **MR. MORIN:** Is that me?

18 **MR. CHIN:** Very briefly, Your Honor.

19 This is the motion that seeks to preclude Alcon
20 from asserting that LenSx is a different entity. That
21 part is actually now undisputed.

22 And also, that it -- that the knowledge of the
23 LenSx employees are imputable to Alcon and LenSx. And
24 that part still remains for the Court to decide.

25 **THE COURT:** Okay. Hold up. Sorry. Give me a

1 second.

2 Okay. I'm very sorry. I now have it in front
3 of me.

4 **MR. CHIN:** Sure.

5 Our motion in limine, Number 1, the Alcon-LenSx
6 issue.

7 **THE COURT:** Okay. So the first thing you want
8 is, they can't suggest Alcon Research is different from
9 LenSx, right?

10 **MR. CHIN:** Yes. And I believe they --

11 **THE COURT:** That's moot, right?

12 **MS. HEFFERNAN:** Yes. Yes, Your Honor.

13 **THE COURT:** You said that. Okay.

14 **MR. CHIN:** And just as a procedural matter, as
15 you recall, this issue did come in preliminary injunction
16 context where --

17 **THE COURT:** I don't recall. But anyway, I'll
18 take your word on it.

19 **MR. CHIN:** Okay. Does that -- I'm just
20 wondering, does that become an order or we just live by
21 their representations in the papers here?

22 **THE COURT:** I trust both of you all. I mean,
23 you know, they said they are not going to do it. If they
24 do, call them on it. And I'll be pretty angry.

25 **MR. CHIN:** Understood.

1 **THE COURT:** I do not believe they will. All
2 right.

3 Two, that Alcon can't suggest that it lacks
4 knowledge -- or lacks, sorry -- it lacks Alcon Research's
5 knowledge.

6 You've also agreed you're not going to do that,
7 correct?

8 **MS. HEFFERNAN:** That one, I think, we're going
9 to need to argue.

10 **THE COURT:** Okay. All right.

11 **MR. CHIN:** The knowledge of the -- perhaps, I
12 can just clarify. The knowledge of -- I think there are
13 two knowledge parts. One is Alcon Research lacks
14 LenSx's -- the corporation's knowledge.

15 **THE COURT:** Right. I thought they were okay
16 with that.

17 **MR. CHIN:** I thought so too.

18 **MS. HEFFERNAN:** Well, we -- I think we're going
19 to have to argue this, because we would not contest any
20 knowledge that is legally imputable to LenSx.

21 There is a -- I think we're going to need to
22 argue this.

23 **THE COURT:** Okay. Is this going to, basically,
24 boil down to, I think, it's -- we're going to have an
25 employee, and the question is going to be, the employee

1 knew something, and whether that knowledge was gained
2 during the scope of the employment or whether it was
3 imputable to LenSx.

4 **MR. CHIN:** That's correct.

5 **THE COURT:** Isn't that where the rubber hits
6 the road?

7 **MR. CHIN:** It is. And the restatement standard
8 is, is it material to the agents' duties to LenSx, the
9 principle --

10 **THE COURT:** Right.

11 **MR. CHIN:** -- which we know is renamed
12 Alcon Research.

13 And on that point, there are two points that we
14 cite in the briefs that we think are important.

15 Number 1, Alcon already took the position in
16 upholding the common interest privilege, that these
17 individuals -- and let me quote their language to make
18 sure I'm not misquoting it here.

19 "Goldstein and Vardin" -- two of the
20 programmers -- "primary duties involved writing source
21 code for the LenSx system."

22 That sounds an awful lot like the restatement
23 standard: Is it material to the agents' duties? Is
24 writing the software material to the agents' duties?

25 **THE COURT:** Right.

1 **MR. CHIN:** Now, Alcon argues that it's a fact
2 issue, and perhaps, it's a fact issue. But here it's a
3 fact issue that is undisputed, that it's propounded by
4 Alcon itself.

5 And under 403, of course, there's significant
6 undue prejudice if they're allowed to argue something
7 that -- their common interest motion itself.

8 **THE COURT:** See, I'm trying to figure out --
9 like, what I don't get from reading the motions is how
10 this is going to arise.

11 And I think it could arise, like you're -- I
12 mean, essentially, you're both going to be taking a risk,
13 and at the end of the day, I'm going to rule, and it's
14 going to be in front of the jury. And whoever loses,
15 loses big.

16 I mean, give me the specific example. Like,
17 how is it going to arise?

18 Give me a question you're going to bring up
19 that you already know they're going to object to. I mean,
20 I'm trying to figure out how this is going to come --

21 **MR. CHIN:** Sure.

22 And perhaps I can try to remind you of how it
23 came up in the preliminary injunction hearing.

24 **THE COURT:** Okay.

25 **MR. CHIN:** They made an argument that LenSx

1 gave representations and warranties from the -- and this
2 is a quote from the hearing -- "from the people who sold
3 it to us; namely, the programmers who are part of the
4 company."

5 **THE COURT:** Right.

6 But if they did that at trial, right, then they
7 can -- you get a curative jury instruction, right, that
8 they were LenSx, and so they are the people who sold it to
9 them.

10 I mean, don't you cure any argument with a jury
11 instruction?

12 **MR. CHIN:** If that instruction is given to the
13 jury, I suppose that would cure that specific issue.

14 We're trying to nip this in the bud by getting
15 a ruling that this doesn't have to come up in the first
16 place.

17 **THE COURT:** But it's the hypothetical, I guess.
18 So, you know, because you're asking -- you know, you're --
19 I go by the motions in front of me.

20 I mean, the motion, it says -- the motion
21 literally says, "Preclude them from arguing or suggesting,
22 one, that Alcon Research is a different entity from
23 LenSx."

24 They said they're not going to do it.

25 Two, that "Alcon Research lacks knowledge held

1 by LenSx employees about matters material to their
2 duties."

3 Now, it sounds like they're hedging, but it
4 seems to me, I would instruct, as a matter of law,
5 whether -- you know, something about if an employee gained
6 knowledge during the scope of its employment, that
7 knowledge is attributable to the company.

8 And then you can all argue this was computer
9 programming while this employee was working for LenSx, of
10 course it's imputable.

11 Or you can tell me, because I don't know, I
12 mean, maybe I'm supposed to -- I'll just, as a matter of
13 law, tell them that.

14 I'm trying to figure out how it's going to come
15 up. I think -- it sounds like you might be anticipating
16 they're being way more aggressive than they're going to
17 be, but maybe not.

18 **MR. CHIN:** Perhaps. And, you know, if it
19 simplifies things, we could narrow it down to, really,
20 who's at issue.

21 Obviously, there's a lot of employees involved.
22 But as you probably recall from the preliminary injunction
23 motion, there's really three employees involved.

24 There is Goldstein, the director of software
25 engineering at Alcon Research; Hegedus, the senior

1 principal engineer at Alcon Research; and Vardin,
2 associate director, principal software engineer at Alcon
3 Research.

4 **THE COURT:** Okay.

5 **MR. CHIN:** Those are the three individuals
6 who --

7 **THE COURT:** Are you going to play their
8 depositions?

9 **MR. CHIN:** We are going to play their
10 depositions.

11 **THE COURT:** Okay. And what are they going to
12 say? They're going to say they stole the code?

13 **MR. CHIN:** I expect we will say that they stole
14 the code. And I can imagine --

15 **THE COURT:** Well, haven't you heard the
16 depositions? I mean, what -- seriously, what are they
17 going to say? Are they going to say "I stole it"? I'm
18 just curious.

19 **MR. CHIN:** Well, I'm not quite sure they're
20 going to say in so many words.

21 But I think between that and the evidence
22 that's presented at trial, it will indicate that the code
23 was stolen, likely by one of those three or a combination.

24 **THE COURT:** All right.

25 **MR. CHIN:** Those three individuals who worked

1 for LenSx, and who also worked for Alcon Research, the new
2 name, are software engineers.

3 Alcon took the position in prevailing on a
4 common interest motion, that Goldstein and Vardin's
5 primary duties involved writing source code for the LenSx
6 system.

7 If there's some argument, for example, in
8 opening or closing or implied through an expert witness,
9 that, "Oh, those are just rogue employees who happened to
10 be writing software. We, Alcon Research, wouldn't have
11 done or authorized such a thing," that would directly
12 violate the case law on when an employee's knowledge would
13 be imputable to the company.

14 **THE COURT:** But that's a legal question and
15 part of the instruction. And if they make an argument
16 that doesn't comport with the law, they're going to look
17 horrible in front of the jury. I'm going to correct them.

18 **MR. CHIN:** Well, that does give me some
19 comfort. But I suggest that we could nip the issue in the
20 bud by --

21 **THE COURT:** When you say "nip it in the bud,"
22 see, I don't think you can because they're not willing to
23 agree that they're going to make an argument that violates
24 those principles of law.

25 But let me quickly hear from them. I just

1 don't see this as an issue.

2 **MR. CHIN:** Okay.

3 **MS. HEFFERNAN:** Your Honor is correct.

4 And, in fact, the parties both have jury
5 instructions on that legal issue. And so it's going to go
6 to the jury. Your Honor is going to instruct the jury.
7 And if Your Honor feels at some point it needs to -- the
8 Court needs to make a curative instruction regarding the
9 law, then we'll cross that bridge when we get there. I
10 don't think we will get there.

11 The primary reason Alcon is opposing this
12 motion is because knowledge is quintessentially a fact
13 issue, and who knew what and when and by whom they were
14 employed. And the legal imputation, I guess, or
15 imputability of that knowledge, those are quintessentially
16 fact issues that are for the jury.

17 And this motion --

18 **THE COURT:** All right. I'm going to deny the
19 motion.

20 **MS. HEFFERNAN:** Okay.

21 **THE COURT:** Let's go. Next motion.

22 **MS. HEFFERNAN:** Okay.

23 **THE COURT:** And we'll fix this with jury
24 instructions. I just don't think this is an issue.

25 Next motion.

1 **MR. SAMMI:** Your Honor, if you'd like to
2 address plaintiffs' motion, MIL 2, physician choice.

3 **THE COURT:** Yep.

4 **MR. SAMMI:** Tony Sammi. Thank you, Your Honor.

5 **THE COURT:** Thank you.

6 **MR. SAMMI:** It's a pleasure to be before you.
7 I know we're pressed for time. I think that there's not
8 much of a dispute here.

9 **THE COURT:** That's what I think.

10 **MR. SAMMI:** And I think there's those carve
11 outs that Alcon wants that are unnecessary. We just want
12 to make sure that no argument is presented that a verdict
13 for J&J would impact, you know, the marketplace or the
14 folks.

15 **THE COURT:** They said they're not going to make
16 that argument.

17 Are you sticking to that representation?

18 **MR. LOCASCIO:** Yes.

19 **MS. HEDGES:** Yes, Your Honor.

20 **MR. SAMMI:** Ms. Hedges is going to argue it,
21 but we are --

22 **MS. HEDGES:** Yes, Your Honor.

23 **THE COURT:** Yep? Okay.

24 What else?

25 **MR. SAMMI:** That's it.

1 **THE COURT:** I think just -- you want to say
2 something? Go ahead. Come up.

3 **MS. HEDGES:** Quickly, Your Honor. Yes. We
4 just want to make sure that -- first of all, that we can
5 still argue to Your Honor with regard to equitable
6 issues --

7 **THE COURT:** Yes, can you.

8 **MS. HEDGES:** -- that there could be an impact.

9 All right. And we also want to make sure that
10 we can argue about things like patient or physician
11 preference, which are relevant to things like lost
12 profits.

13 **THE COURT:** And they agree with that, correct?

14 **MR. SAMMI:** Your Honor, yes, patient and
15 physician preference is fine so long as it doesn't go to
16 the ultimate -- you know, it doesn't leave the impression
17 with the jury that --

18 **THE COURT:** Well, leave the impression. I
19 mean, look, I don't know what -- they're going to be left
20 with whatever they are. That's the whole -- that's what
21 trial lawyers do.

22 **MR. SAMMI:** You're right, Your Honor. I'm
23 sorry. I misspoke.

24 I meant to the point that it's prejudicial;
25 meaning, that it is --

1 **THE COURT:** Okay. Well, then you can object at
2 the trial. We'll see.

3 **MR. SAMMI:** We will do that.

4 **THE COURT:** But again, I don't think this is an
5 issue.

6 Okay. So motion is denied as moot.

7 Next.

8 **MR. MORIN:** I think in terms of the plaintiffs'
9 motion, it's the contents of the privileged communications
10 issue.

11 **THE COURT:** Right.

12 **MR. MORIN:** So Your Honor has indicated, in no
13 uncertain terms, that there will be at least discussion in
14 disgorgement portion, that they'll be allowed to talk
15 about the alleged delay and bringing suit.

16 **THE COURT:** Yes.

17 **MR. MORIN:** But --

18 **THE COURT:** Well, why not, also, just
19 mitigating damages?

20 **MR. MORIN:** Well, there's two issues on the
21 mitigation of damages front.

22 The first is, I think we all agree that -- and
23 this was part of a different motion. But I think we all
24 agree -- I think it's Motion 4 -- that on actual damages,
25 which is all mitigation is relevant to, is actual damages.

1 **THE COURT:** Right.

2 **MR. MORIN:** On actual damages, laches is out in
3 view of *Petrella*. And we think mitigation would be just
4 another way of saying the laches --

5 **THE COURT:** Now, wait, wait, wait, wait.

6 **MR. MORIN:** Yes, Your Honor.

7 **THE COURT:** First rule, it says -- in *Petrella*,
8 is: You can't use laches to preclude a damages claim.

9 Where does *Petrella* say anything about
10 mitigating damages?

11 **MR. MORIN:** This was Sy's motion. May I, Your
12 Honor?

13 **THE COURT:** Sure.

14 **MR. DAMLE:** Your Honor, the fundamental
15 principle in *Petrella* was that, where Congress has set out
16 a statute of limitations, it has set forth the consequences
17 of delay. That's the principle. And that was picked up
18 in *SCA Hygiene*, the patent case, to say it's separation of
19 powers principle, when Congress has said these are the
20 consequences of delay through a statute of limitations.

21 It is a separation of powers problem for a
22 Court to impose an additional consequence for that delay
23 on top of what Congress has indicated to be the
24 consequence of delay. That's the fundamental principle
25 from both *Petrella* and *SCA Hygiene*.

1 The mitigation defense that they have is
2 entirely based, entirely based on JJSV's delay in bringing
3 its lawsuit. That they have no other basis for their
4 mitigation claim.

5 And so given the nature -- so we're not saying
6 there couldn't be some possible mitigation type of
7 argument. Their mitigation claim is one that's based
8 solely on our delay in bringing suit. And that claim is
9 barred by both -- that defense, that flavor of defense, is
10 barred both by *Petrella* and by *SCA Hygiene*.

11 **THE COURT:** Okay. Anything else? We moved to
12 four. What happened to three?

13 **MR. MORIN:** There was a subsidiary issue on the
14 mitigation question that related to four.

15 **THE COURT:** Oh, okay.

16 **MR. MORIN:** So back to three, Your Honor. I'm
17 sorry to play musical chairs --

18 **THE COURT:** No problem.

19 **MR. MORIN:** -- but Mr. Damle knows more --

20 **THE COURT:** And incidentally -- so...

21 Go ahead. Let's do Number 3.

22 **MR. MORIN:** Sure.

23 And so the only issue with Number 3 that I
24 think we're left with is the idea that -- they want to
25 bring up that lawyers were involved, for whatever reason,

1 in the investigation.

2 And we've already had Judge Hall look at
3 everything, say they have all the facts, and say -- and we
4 should be able to take the privilege without being --
5 there being some suggestion as to what the lawyers'
6 involvement may or may not have meant.

7 There's a 403 issue. It's not probative to
8 anything.

9 **THE COURT:** I just want to make sure, that's
10 what the question is, 403, right?

11 **MR. MORIN:** Yeah, that's correct, Your Honor.
12 Yes, that's it.

13 **THE COURT:** Yeah. I'm going to deny the motion
14 in limine. I don't think it's unfairly prejudicial to say
15 there were lawyers involved. I think, probably, there's
16 an assumption there would be. I don't think you're
17 prejudiced that way.

18 Now, if they went further and made a suggestion
19 that, you know, that would require you to invoke the
20 privilege, I mean, that would be a different issue --

21 **MR. MORIN:** Right.

22 **THE COURT:** -- you know, depending on how the
23 question were phrased. But if they just mention in
24 passing, I think it will be of no consequence.

25 **MR. MORIN:** We would -- I understand, Your

1 Honor.

2 If they were to invoke, I would ask this favor.

3 If -- asking favors.

4 If they were to invoke a question that
5 reasonably would call for the privilege, I would ask that
6 they bring it, and we discuss it outside the presence of
7 jury. If they were planning to invoke a question that
8 could call for the privilege, we would reasonably call for
9 insertion of the privilege.

10 **THE COURT:** That's just such a vague -- I
11 think, look, we've got able trial lawyers.

12 The question comes out, you can frame an
13 objection. If we have to, we'll go to sidebar, we'll hash
14 it out.

15 **MR. MORIN:** Okay. Thank you, Your Honor.

16 **THE COURT:** All right. So that dispenses --
17 Number 3 is denied as moot.

18 Then we get to Number 4, which is mitigation --

19 **MR. LOCASCIO:** Let me ask --

20 **THE COURT:** Yeah. Go ahead.

21 **MR. LOCASCIO:** You said, "denied as moot."

22 **THE COURT:** Well --

23 **MR. LOCASCIO:** It's not moot. You said that
24 this information comes in.

25 Their argument was, it has no relevance to

1 anything and shouldn't be --

2 **THE COURT:** They filed a motion in limine to
3 preclude you from doing it, and I've denied it as moot.
4 You won.

5 **MR. LOCASCIO:** I'll take the denial.

6 When you said "denied as moot," typically, my
7 understanding is that means, like, we've all agreed it's
8 not an issue.

9 And I don't -- for instance, patient two -- or
10 Motion in Limine 2 was, like, okay, they don't want
11 something, we agree we're not going to do the something,
12 we --

13 **THE COURT:** Oh, okay. I'll just deny it.
14 Sorry.

15 It's denied without prejudice to raise at trial
16 objections to questions that plaintiffs believe would
17 require invocation of the privilege.

18 **MR. LOCASCIO:** With any MIL, as I understood
19 it, Your Honor, if somebody does something, you could
20 obviously reraise it if it became so prejudicial.

21 **THE COURT:** Yep. All right. Fair enough.
22 Thank you for the clarification.

23 **MR. DAMLE:** Thank you, Your Honor.

24 If I could be heard on the rest of MIL 4.

25 **THE COURT:** Now, we're at Number 4, mitigation.

1 All right. Hold on. That's going to take a little bit of
2 time. Let me just think.

3 Actually, what we will do is we'll call it a
4 day. We'll resume with the rest of the motions in limine
5 on February 6th.

6 Sorry. I'm just pulling up the calendar here
7 to give you a time.

8 Let's do it at 1:00.

9 Okay. Then jury selection, I recommend we --
10 let's do it the 10th. All right? We'll have the jury
11 brought in the 10th.

12 **MR. MORIN:** Great, Your Honor.

13 **THE COURT:** And we'll pick them. I'm sorry,
14 you're probably going to be here the weekend anyway, you
15 out-of-town folks, so -- right? And it just makes things
16 move and then we'll start right at 8:30 on the 13th.

17 **MR. MORIN:** That sounds fine.

18 And we'll try to work with our friends to --
19 there are -- not many disputes on the preliminary jury
20 instructions, but maybe Your Honor, on Friday if
21 there's -- after we pick the jury, if there's anything
22 left, we could --

23 **THE COURT:** We might, frankly, be able to take
24 care of that on the 6th. I've got the afternoon -- I'm
25 sorry?

1 **MR. LOCASCIO:** I was curious of the same
2 question. If we want to have first round charge
3 conference, is the -- we plan to do it on the 6th if we
4 can get to it, or the 10th.

5 **THE COURT:** Correct. So basically, I'm giving
6 you the entire afternoon of the 6th.

7 **MR. LOCASCIO:** Okay.

8 **THE COURT:** Okay. To see if we can get cleared
9 as many issues as we possibly can.

10 **MR. MORIN:** Just so I know what to be ready
11 for, though, what I -- is Your Honor's preference, in
12 terms of the jury instructions, only to address the
13 preliminary instructions then, because we're going to see
14 how things shape out and do a charge conference later for
15 the final instructions?

16 I just want to know what we should be prepared
17 to address on this --

18 **THE COURT:** You've got a huge team. I would be
19 prepared for everything. Because if I can get to it,
20 let's take advantage of the time.

21 **MR. LOCASCIO:** And I would say -- the reason I
22 also suggested the 10th, there are a handful of issues.
23 For instance, the open disgorgement question. But even
24 like willfulness and some of these other issues,
25 deductions and whether that's in or out, that -- how we

1 open the case, I don't think -- as much as we can get done
2 on the charge before openings, will serve us all a world
3 of good if we can do it.

4 **THE COURT:** Right. There's no request to stage
5 this thing. I mean, you don't want to stage damages,
6 willfulness until after infringement?

7 **MR. LOCASCIO:** We've not requested it to be
8 akin to be, sort of, bifurcated.

9 Give us -- we'll talk about that and come back
10 on the 6th. If somebody -- if we collectively think, or
11 one of us really strongly thinks it makes sense.

12 **THE COURT:** I mean, I've got to tell you, I'm
13 not -- I mean, I'm normally very receptive to those
14 requests. In this case, at least it's the little I
15 understand on the facts, I mean --

16 **MR. MORIN:** I think it's a damages case,
17 Your Honor.

18 **THE COURT:** Yeah. I mean, the guy stole the
19 stuff. I mean, unless that's really going to be disputed.
20 Now, maybe you are.

21 I don't know what the facts are, but I never
22 heard any vigorous defense saying, no, those guys didn't
23 steal the source code. It's more like how much of the
24 code was stolen, how much of that code that was stolen is
25 in our code.

1 I mean, those are the things that I'm sensing.
2 But anyway, you can all correct me if I'm wrong on
3 February 6.

4 **MR. MORIN:** One other thing we can --
5 Your Honor, if we can get guidance on or before
6 February 6, I'm holding out hope that you're going to
7 conclude that disgorgement is for the jury. But you
8 indicated -- I'm a realist. I want to listen to the
9 Court.

10 **THE COURT:** Right.

11 **MR. MORIN:** You've indicated there's some
12 possibility that may not happen.

13 It would be helpful for us to know, for
14 witnesses and the order of presentation of things, what
15 that might mean. You know, the overlapping evidence gets
16 presented. Do you want to do it after we excuse the jury
17 each day? Is it a separate phase? Sometime later in
18 time?

19 I would just -- it would be helpful for us to
20 work with our witnesses and for our trial preparation to
21 know that.

22 I'm hoping I'm asking a moot questions because
23 you're at least going to do the advisory verdict, which is
24 what their lead case did. But -- but, Your Honor -- and
25 so that we don't have to retry it when the Federal Circuit

1 agrees with me.

2 But if you don't go that route, in that small
3 chance you don't go that route, it would be helpful to
4 know for logistics purposes and I think for our friends
5 also.

6 **THE COURT:** I'm going to try what I can. I've
7 got a two-day trial.

8 Yeah. I'm going to try to get, you know, some
9 decision on the disgorgement when I can. All right.

10 **MR. MORIN:** All right. And if that -- not to
11 beg. And if that decision could also give some guidance
12 on the procedural ramifications.

13 **THE COURT:** Oh, yes.

14 **MR. MORIN:** Is it going to be a month later?
15 Is it going to be in the evenings? Is it going to be --

16 **THE COURT:** No. It's not going to be a month
17 later.

18 **MR. MORIN:** Okay. Great.

19 **THE COURT:** It's going to be either in the
20 evenings or it's going to be right after the jury trial.

21 **MR. MORIN:** Got it.

22 **MR. LOCASCIO:** And I actually don't know -- I
23 think there's some issues that we can talk about then, but
24 it's not going to be another four-day event. It's going
25 to be quick.

1 **THE COURT:** Okay. And just to remind you, the
2 first week of trial we're only going four days.

3 **MR. MORIN:** Correct, Your Honor.

4 **THE COURT:** Right. Okay. And then we have a
5 long weekend, because it's a holiday. And then we resume.

6 **MR. MORIN:** Right. And I think you said you
7 needed to be done by that Thursday --

8 **THE COURT:** Yes.

9 **MR. MORIN:** -- is what we're factoring in.
10 You're not available that Friday.

11 **THE COURT:** Correct.

12 **MR. MORIN:** So I think what both sides are
13 figuring, is four days the first day, and up to three days
14 the second -- second week. Sorry.

15 **THE COURT:** Yeah. Hold on.

16 **MR. LOCASCIO:** I thought it was just -- I
17 thought we only had the Tuesday of the second week. I
18 thought it was four days in week one.

19 **THE COURT:** Well, I've got written you've got
20 16 hours per side, which seems long, but...

21 **MR. MORIN:** Well, it's -- we're trying to get
22 there.

23 **MR. LOCASCIO:** Our spreadsheets all have a lot
24 of red on them.

25 **THE COURT:** Hold up, hold up, hold up.

1 **MR. MORIN:** You did say you had to be done by
2 that Thursday.

3 **THE COURT:** Well, yeah, but I'm -- let me see.
4 I might be able to actually help you.

5 So actually, we can probably spill over until
6 Friday, the 24th, through noon. In other words, I've
7 got -- you know, we should still try to get this done in
8 16 hours. But if you're telling me there's no way to do
9 it, I will listen.

10 **MR. LOCASCIO:** We'll look at our time, and
11 we'll talk about that. Because we have operated, until
12 this very moment, from that moment of the transcript was,
13 you had to be done by Thursday of the first week; meaning,
14 you couldn't be there Friday. That's fine. We have a
15 difference of opinion on this.

16 And then we recalled you saying Tuesday. I
17 have in my notes, like, we're going to close this case on
18 Tuesday.

19 And then if the jury had to deliberate into
20 Wednesday, so be it. If we could have more time and it's
21 useful and we're not just going to, like everything,
22 stretch to the --

23 **THE COURT:** Now, I am worried about that
24 because it seems to me -- so I'll tell you what, come in
25 very, very prepared on February 6th to walk through what

1 your trial is.

2 Who are your witnesses?

3 What are they going to say?

4 How long do you anticipate they will be?

5 Both of you do that. And then I'll see.

6 I'll tell you I've got a little more
7 flexibility. If I think you need more time, I'll give it
8 to you. Right now, we had set 16 hours a side. That's
9 what you should plan on, you know. We'll discuss it on
10 February 6th.

11 **MR. LOCASCIO:** We certainly appreciate, to the
12 extent you think the parties need more time. I'll expect
13 we will happily take it. The pretrial order and
14 everybody's expectations was 16 a side, which gets you, at
15 most, to the Tuesday of the second week.

16 **THE COURT:** Yep. Right.

17 **MR. MORIN:** Yeah. And I don't want to disagree
18 with my friend. Your Honor had said until Thursday, so
19 we've kind of planned that way, although the hours
20 predominate -- the hours predominate.

21 And -- but we could use a little bit more time,
22 and it won't be wasted time. We're having a hard time.

23 We have -- what happens, Your Honor, as I'm
24 sure you're familiar with, you can cut down direct when
25 you have live witnesses. We have a bunch of former

1 employees where the -- so even the deposition testimony,
2 we cut and we cut and we cut, and we still have more hours
3 of it than I'd like. I don't want the jury to watch a
4 lot. But they are the operative people, right?

5 And the depositions are never as constrained as
6 what we could do if we had direct examinations, right?

7 So we're in a situation where we would love
8 20 hours if we can get it, and we won't waste the Court's
9 time.

10 **THE COURT:** All right. Well, yeah, we'll see.
11 Okay.

12 Be prepared on Monday, the 6th, to walk me
13 through all that. Okay.

14 **MR. MORIN:** Thank you, Your Honor, for your
15 time.

16 **MR. LOCASCIO:** Thank you, Your Honor.

17 (The proceedings concluded at 5:15 p.m.)
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CERTIFICATE OF COURT REPORTER

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Bonnie R. Archer
Bonnie R. Archer
Official Court Reporter
U.S. District Court

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68/16 68/19</p> <p>bullish [1] 54/16</p> <p>bunch [1] 120/25</p> <p>burden [2] 14/6 40/1</p> <p>burden's [1] 39/8</p>	<p>care [4] 49/15 63/5 94/14</p> <p>113/24</p> <p>CAROLYN [2] 2/6 3/11</p> <p>CAROLYN HOMER [2] 2/6</p> <p>3/11</p> <p>carries [1] 42/10</p> <p>carve [1] 105/10</p> <p>case [153]</p> <p>cases [35] 9/22 10/12 10/13</p> <p>10/19 12/13 12/14 17/20</p> <p>26/11 26/13 26/19 33/24</p> <p>34/24 36/10 50/14 51/22</p> <p>58/16 63/19 63/23 65/19 67/8</p> <p>70/17 70/25 71/21 72/9 72/17</p> <p>73/10 78/8 80/18 82/11 87/2</p> <p>87/5 90/9 91/8 92/1 93/1</p> <p>cast [1] 5/13</p> <p>Catalys [5] 14/20 14/21 48/14</p> <p>48/16 64/21</p> <p>causal [3] 56/19 57/7 57/7</p> <p>caused [1] 69/18</p> <p>ceded [1] 60/11</p> <p>certainly [6] 34/25 35/3 46/9</p> <p>47/22 94/11 120/11</p> <p>CERTIFICATE [1] 122/2</p> <p>certify [1] 122/4</p> <p>cetera [2] 17/2 31/23</p> <p>CFC [1] 1/6</p> <p>chairs [1] 109/17</p> <p>chance [1] 117/3</p> <p>characterize [1] 31/16</p> <p>characterizing [1] 48/7</p> <p>characters [1] 5/14</p> <p>charge [3] 114/2 114/14 115/2</p> <p>CHIN [9] 2/5 3/10 5/12 10/4</p> <p>14/13 36/18 39/2 40/3 43/15</p> <p>Chirco [3] 67/11 67/14 67/14</p> <p>choice [1] 105/2</p> <p>Circuit [22] 11/12 12/15 13/24</p> <p>34/18 67/11 67/12 71/17</p> <p>72/11 73/1 73/15 84/5 84/12</p> <p>84/13 87/15 87/19 87/21</p> <p>87/22 87/25 88/3 90/24 91/4</p> <p>116/25</p> <p>circumstance [3] 34/2 35/1</p> <p>80/20</p> <p>circumstances [12] 6/11 24/3</p> <p>34/4 34/14 61/2 62/2 62/18</p> <p>63/15 63/22 64/19 67/6 67/10</p> <p>cite [11] 12/18 34/9 34/13</p> <p>35/18 41/22 42/9 44/5 44/10</p> <p>50/9 54/15 98/14</p> <p>cited [7] 36/10 36/18 39/2</p> <p>61/17 63/19 71/2 77/16</p> <p>cites [4] 22/18 36/2 71/17</p> <p>87/2</p> <p>citing [1] 85/10</p> <p>claim [36] 8/2 16/21 17/10</p> <p>18/1 21/18 48/13 52/9 53/15</p> <p>53/25 54/4 57/15 58/18 58/24</p> <p>58/25 59/3 59/5 59/6 59/13</p> <p>59/19 60/3 60/19 60/23 61/19</p> <p>61/25 68/6 72/21 81/7 83/19</p> <p>88/21 89/20 89/20 89/24</p> <p>108/8 109/4 109/7 109/8</p> <p>claimed [1] 40/16</p> <p>claims [13] 15/17 15/17 16/1</p> <p>17/2 17/16 20/18 21/14 27/10</p> <p>28/5 28/7 89/12 89/14 90/1</p> <p>clarification [2] 24/15 112/22</p>
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59/11 59/22 60/11 61/6</p> <p>61/10 64/25 65/13 66/10</p> <p>66/19 66/25 67/2 67/3 67/4</p> <p>70/7 73/6 73/21 74/13 75/9</p> <p>76/12 77/5 78/24 79/25 80/13</p> <p>82/11 84/24 87/1 89/6 90/2</p> <p>92/5 94/2 94/6 94/24 97/19</p> <p>100/18 101/11 103/22 104/12</p> <p>114/13 114/19 116/22 118/5</p> <p>119/11 119/24</p> <p>become [1] 96/20</p> <p>been [21] 8/1 19/12 20/15</p> <p>20/16 21/11 34/21 36/10</p> <p>36/24 39/6 40/18 51/25 53/5</p> <p>67/22 68/4 78/9 80/11 80/13</p> <p>80/14 84/9 84/12 87/4</p> <p>before [17] 1/18 4/14 4/17 5/4</p> <p>6/10 20/4 27/23 63/3 68/10</p> <p>68/20 76/15 76/23 77/17</p> <p>78/17 105/6 115/2 116/5</p> <p>beg [1] 117/11</p> <p>began [2] 27/22 27/23</p> <p>beginning [5] 3/3 27/18 77/18</p> <p>81/8 88/13</p> <p>behalf [2] 3/21 36/8</p> <p>behind [2] 3/10 3/13</p> <p>being [13] 22/14 22/14 22/22</p>	<p>benefit [2] 43/8 44/15</p> <p>benefited [1] 81/22</p> <p>besides [1] 34/10</p> <p>best [9] 4/23 16/5 50/3 58/23</p> <p>63/24 71/6 73/10 74/12 84/4</p> <p>better [2] 79/25 92/24</p> <p>between [3] 19/15 66/23</p> <p>102/21</p> <p>beyond [3] 18/24 28/11 34/4</p> <p>bifurcated [1] 115/8</p> <p>bifurcation [1] 74/21</p> <p>big [11] 7/13 69/11 69/11</p> <p>69/12 73/15 73/25 74/13</p> <p>82/15 93/24 94/9 99/15</p> <p>biggest [1] 65/17</p> <p>billion [12] 57/15 64/17 65/9</p> <p>65/21 69/6 75/3 75/13 75/17</p> <p>76/5 76/13 76/23 83/21</p> <p>billions [1] 73/17</p> <p>binding [1] 13/13</p> <p>bit [13] 8/13 49/7 53/23 55/21</p> <p>57/13 59/1 76/22 76/25 78/4</p> <p>87/17 93/18 113/1 120/21</p> <p>black [2] 15/19 89/18</p> <p>black-letter [1] 15/19</p> <p>blame [1] 12/7</p> <p>blaming [1] 82/24</p> <p>blank [2] 70/21 71/7</p> <p>BLITZER [2] 2/4 3/11</p> <p>Bloomfield [1] 3/8</p> <p>BLUMENFELD [2] 1/23 3/6</p> <p>blur [1] 54/17</p> <p>blurred [1] 51/13</p> <p>board [1] 37/19</p> <p>boil [1] 97/24</p> <p>Bonnie [2] 122/7 122/8</p> <p>book [4] 68/3 68/4 69/3 78/8</p> <p>books [4] 44/20 45/2 68/7</p> <p>68/8</p> <p>both [27] 9/6 14/14 14/23 16/9</p> <p>20/6 20/7 22/13 24/4 46/5</p> <p>47/13 48/21 51/7 52/21 64/20</p> <p>73/5 85/12 88/1 88/14 90/24</p> <p>96/22 99/12 104/4 108/25</p> <p>109/9 109/10 118/12 120/5</p> <p>bottom [2] 16/24 83/5</p> <p>bought [1] 68/8</p> <p>bound [1] 42/16</p> <p>boy [1] 52/1</p>	<p>C</p> <p>C.A [1] 1/6</p> <p>calculation [4] 9/18 77/9 78/22</p> <p>94/1</p> <p>calendar [1] 113/6</p> <p>California [2] 12/20 13/2</p> <p>call [7] 52/6 84/3 88/17 96/24</p> <p>111/8 111/8 113/3</p> <p>called [2] 25/15 86/22</p> <p>calls [1] 111/5</p> <p>came [2] 74/21 99/23</p> <p>camp [1] 4/9</p> <p>can [93] 4/8 5/21 5/25 6/6</p> <p>6/19 7/22 8/2 8/5 8/6 9/12</p> <p>10/23 13/10 13/11 13/19</p> <p>13/25 15/7 16/6 17/25 18/11</p> <p>33/17 33/22 33/25 34/9 34/13</p> <p>35/7 36/1 36/1 36/15 37/4</p> <p>42/25 43/6 43/16 45/24 49/12</p> <p>50/21 50/21 51/10 53/1 56/15</p> <p>56/23 56/25 58/16 59/11</p> <p>60/18 60/24 61/13 62/7 66/7</p> <p>70/18 71/3 72/24 73/20 75/7</p> <p>79/1 79/2 82/5 85/4 87/8</p> <p>88/11 88/17 90/15 90/17</p> <p>94/10 94/11 95/6 95/15 97/12</p> <p>99/22 100/7 101/8 101/11</p> <p>102/14 103/22 106/4 106/7</p> <p>106/10 107/1 111/12 114/4</p> <p>114/8 114/9 114/19 115/1</p> <p>115/3 116/2 116/4 116/5</p> <p>117/6 117/9 117/23 119/5</p> <p>120/24 121/8</p> <p>can't [16] 12/6 17/20 28/14</p> <p>38/15 45/4 79/23 80/10 80/11</p> <p>80/15 80/20 80/24 82/13</p> <p>82/21 96/8 97/3 108/8</p> <p>cannot [2] 53/9 62/24</p> <p>capable [1] 89/2</p> <p>captured [1] 18/5</p>	<p>care [4] 49/15 63/5 94/14</p> <p>113/24</p> <p>CAROLYN [2] 2/6 3/11</p> <p>CAROLYN HOMER [2] 2/6</p> <p>3/11</p> <p>carries [1] 42/10</p> <p>carve [1] 105/10</p> <p>case [153]</p> <p>cases [35] 9/22 10/12 10/13</p> <p>10/19 12/13 12/14 17/20</p> <p>26/11 26/13 26/19 33/24</p> <p>34/24 36/10 50/14 51/22</p> <p>58/16 63/19 63/23 65/19 67/8</p> <p>70/17 70/25 71/21 72/9 72/17</p> <p>73/10 78/8 80/18 82/11 87/2</p> <p>87/5 90/9 91/8 92/1 93/1</p> <p>cast [1] 5/13</p> <p>Catalys [5] 14/20 14/21 48/14</p> <p>48/16 64/21</p> 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